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No. ____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

LTC. ALBERTIS C. WILSON, LTC. JAMES A. GREEN, CWO STEPHEN J. WEISSENBERGER, LTC. HOWARD A. HARVEY, LTC. JERALD D. NELSON and MAJOR DAVID V. OLSON,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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PETITION FOR A WRIT OF CERTIORARI

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March 14, 1991

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QUESTIONS PRESENTED

At all relevant times, 10 U.S.C. § 1163(d) provided that:

> "Under regulations to be prescribed by the Secretary concerned, . . . a [reservist] who is on active duty and is within two years of . . . retirement . . . may not be involuntarily released . . . before he becomes eligible . . . for [retirement], unless his release is approved by the Secretary."

"Active duty" was defined in 10 U.S.C. § 101(22) to include:

> "full-time training duty, annual training duty, and attendance [at a service school]."

In 1987, the Federal Circuit held in *Ulmet v. United States*, 822 F.2d 1079, rehearing and rehearing en banc denied, that these statutes unambiguously protected reservists on training duty from release. The court also found no legislative history to the contrary. Soon thereafter, Section 1163(d) was amended to insert "other than for training" after "active duty."

In this case, the Federal Circuit has ruled that the pre-amendment Section 1163(d) was ambiguous after all, because "active duty" was not defined in the provision itself. Looking, therefore, to the legislative history, including particularly the 1987 amendment, the court held that the pre-amendment statute did not protect Petitioners, reservists released from training duty before 1987. Also, although the required regulations have never been issued, the court upheld certain releases because, even though Petitioners were unaware of their rights, they did not timely assert them, or if they did, the Secretary, in any case, validly approved the releases.

Against this background, the questions presented are whether the Federal Circuit erred in ruling:

That 10 U.S.C. § 1163(d), in view of its legislative history, including an amendment effectively applied retroactively, did not protect reservists on training tours from release.

That 10 U.S.C. § 1163(d) was ambiguous.

That the releases here were voluntary, even if uninformed, or, if not voluntary, were validly approved, even if the approvals were not pursuant to required regulations.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. ———

LTC. ALBERTIS C. WILSON, LTC. JAMES A. GREEN, CWO STEPHEN J. WEISSENBERGER, LTC. HOWARD A. HARVEY, LTC. JERALD D. NELSON and MAJOR DAVID V. OLSON,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Petitioners, reserve officers in the United States Army and Air Force, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit which was entered on October 19, 1990, and modified, on rehearing, by order entered on December 17, 1990, and the judgment and opinion of that court entered on January 24, 1991, rehearing denied February 14, 1991 and rehearing en banc denied February 26, 1991.

OPINIONS BELOW

The October 19, 1990 decision of the Federal Circuit for which review is sought in the case of Petitioner Wilson is reported at 917 F.2d 529 and is reproduced in

Appendix A hereto. The court's modification of this decision on rehearing, entered on December 17, 1990, is unreported but is reproduced in Appendix I hereto. The decision of the Claims Court vacated and remanded by the Federal Circuit on rehearing is reported at 16 Cl. Ct. 765 (1989) and is reproduced at Appendix C hereto.

The January 24, 1991 decision of the Federal Circuit for which review is sought in the cases of Petitioners Green *et al.* is unreported but is reproduced in Appendix B hereto. The Federal Circuit's February 14 and 26, 1991 orders denying rehearing and rehearing en banc are unreported but are reproduced in Appendix J hereto. The earlier decision of the Federal Circuit withdrawn by the January 24, 1991 decision is unreported but is reproduced in Appendix K hereto. Except for *Green v. United States*, 17 Cl. Ct. 716 (1989), the decisions of the Claims Court affirmed by the Federal Circuit's January 24, 1991 decision are unreported. All of the decisions are reproduced in Appendices D, E, F, G and H hereto.

JURISDICTION

The decision of the Federal Circuit for which review is sought in the case of Petitioner Wilson was entered on October 19, 1990 and modified on rehearing by order entered on December 17, 1990. This Petition has been filed within 90 days of the latter date, as required by 28 U.S.C. § 2101(c). The decision of the Federal Circuit for which review is sought in the case of Petitioners Green *et al.* was entered on January 24, 1991, and rehearing was denied on February 14, 1991. This Petition has been filed within 90 days of that date, as required by 28 U.S.C. § 2101(c). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The statutory provisions involved in this case are 10 U.S.C. § 1163(d), as that provision stood prior to its amendment in December 1987, and 10 U.S.C. § 101(22). They are reproduced in Appendix L hereto.

STATEMENT OF THE CASE

When crisis flared in the Middle East and war eventually ensued, it was to our military reserves that this country immediately turned in its need. Welcomed as they have been in time of battle, however, the reserves have often been the subject of discrimination by the regular military once the exigencies have passed.[1] It was precisely to protect against one such form of abuse that Congress enacted the so-called "sanctuary" provision codified in 10 U.S.C. § 1163(d).

Specifically, after World War II and the Korean War, the Army had been using retirement as an incentive to continued service by reserve personnel and then releasing such personnel just months short of qualifying for retirement.[2] The 1956 amendments to the Armed Forces

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[1] The following item in a national news periodical is a current reflection of the inveterate problem:

> "President Bush last week praised the 100,000 'citizen soldiers' serving in the gulf, but apparently the Pentagon doesn't fully share his enthusiasm for reservists. Even though the government has spent 10 years and $100 billion training the National Guard for war, Army brass has so far refused to deploy the Guard's fighting units. Reservists represent almost 50% of U.S. combat capability, but army reservists say they are being shut out by turf-conscious commanders."

Time, February 4, 1991, at 15.

[2] *See* Hearings on H.R. 9952 Before the Sen. Comm. on Armed Services, 84th Cong., 2d Sess. 3-4 (1956) (Statement by Ltc. James O. Jones, Office of the Deputy Chief of Staff for Personnel, Department of the Army) ("1956 Hearings"); Cong. Rec. S11334 (June 1956).

Reserve Act of 1952 remedied this abuse.[3] The sanctuary provision Congress enacted originally provided:

> "Under regulations to be prescribed by the Secretary concerned, . . . a [reservist] who is on active duty and is within two years of . . . retirement . . . may not be involuntarily released . . . before he becomes eligible . . . for [retirement], unless his release is approved by the Secretary."

The term "active duty" was and is still defined in 10 U.S.C. § 101(22) as:

> "full-time training duty, annual training duty, and attendance [at a service school]."

The required regulations have never been promulgated.

Petitioners are all reserve officers in the United States Army and Air Force who served active duty tours sufficient to bring the service time accumulated by each to within two years of retirement. They served their tours believing they were working toward retirement, if not toward the sanctuary from release afforded by Section 1163(d). They were nevertheless denied sanctuary because they each reached the two-year point on a tour denominated as a training tour, a circumstance that, because of the military's personnel practices, has confronted many reservists.[4]

In particular, after several tours of reserve duty, Ltc. Wilson received orders to report for a 179-day tour de-

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[3] *See* Pub. L. No. 676, c. 534, 70 Stat. 517 (Jul. 9, 1956) (then codified at 50 U.S.C. § 1016(d) (1956)).

[4] The military maintains that it has irreversible discretion to label tours as training, *see, e.g.*, Defendant's Motion to Dismiss or, in the Alternative, for Summary Judgment, *Wilson v. United States*, No. 484-87C (Cl. Ct. filed Feb. 14, 1991), and the military has regularly labelled tours as training to avoid manpower ceilings. *See* Remarks of Counsel for the United States during oral argument in *Green v. United States*, No. 89-1714 (Fed. Cir. argued March 5, 1991).

nominated special active duty training, although Ltc. Wilson actually worked, not trained, on the tour. Ltc. Wilson completed 18 years of active duty service during this tour and, under 10 U.S.C. § 3911, became eligible for retirement after two more years of service.[5]

On February 6, 1984, Ltc. Wilson, while still on tour, wrote to Army headquarters, requesting that he be retained on active duty under Section 1163(d). This request was ultimately denied by a written response dated October 5, 1984, on grounds that sanctuary could not be reached while on a "training" tour.

In 1987, however, in *Ulmet v. United States*, 822 F.2d 1079, the Federal Circuit ruled that reserve officers on training tours were entitled to sanctuary under Section 1163(d). The court based its decision on the plain language of the statute and the related definition of "active duty" in 10 U.S.C. § 101(22). It also found nothing to the contrary in the legislative history. Requests by the Army for rehearing and rehearing en banc were denied, as was a request by the Army to the Solicitor General to seek this Court's review. On August 13, 1987, therefore, Ltc. Wilson filed a complaint in the Claims Court, alleging that he had been released in violation of Section 1163(d) and seeking back pay and reinstatement to active duty.

On December 30, 1987, the Army, in response to *Ulmet*, had Section 1163(d) amended in the midst of a holiday season budget crisis. The words "other than for training" were inserted after "active duty."[6] No publicity or debate attended this eleventh-hour amendment.

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[5] Section 3911 provides: "The Secretary of the Army may, upon the officer's request, retire a regular or reserve commissioned officer of the Army who has at least 20 years of service . . . ."

[6] Pub. L. No. 100-224, 101 Stat. 153B (Dec. 30, 1987).

In a decision rendered May 22, 1989 (App. at 24a), the Claims Court ruled that Ltc. Wilson had been released contrary to Section 1163(d) and awarded him the relief requested. In so doing, it expressly rejected Army arguments attempting to apply the 1987 amendment retroactively. The Army appealed and again argued that the 1987 amendment should be applied retroactively. The appeal, initially heard by a Federal Circuit panel consisting entirely of three retired military officers, was sua sponte referred to the court en banc.[7]

Without further briefing or argument, the en banc Federal Circuit embarked on a course never before advanced in the proceedings. The Federal Circuit found that Section 1163(d) was unclear because the term "active duty" was not defined within that provision but elsewhere in Title 10. (App. at 11a.) The court, therefore, revisited the legislative history and, totally ignoring a plainly critical portion of the history, but heavily relying on the 1987 amendment thirty years after-the-fact (App. at 10a, 11a, 14a n.6), purported to find a picture that "demand[ed] a different result from that reached in *Ulmet*." (App. at 14a.) In particular, the court ruled that "active duty" in Section 1163(d), even prior to amendment, did not cover reserve officers on training tours, notwithstanding the specifically contrary definition in 10 U.S.C. § 101(22). *Ulmet* was overruled, but not without a lengthy dissent challenging the court's departure from *stare decisis*, its retroactive

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[7] It is reasonable to conclude that the impetus for having the Wilson appeal reviewed en banc, after it had already been argued, originated with the panel. Under the Federal Circuit's decisions, a panel is bound to follow an existing precedent of the Circuit unless it is overruled by the court en banc. *See Kingsdown Medical Consultants, Ltd. v. Hollister, Inc.*, 863 F.2d 867, 876 (Fed. Cir. 1988), *cert. denied*, 109 S. Ct. 2068 (1989). Had the panel been disposed to follow *Ulmet*, in which, indeed, a request for rehearing en banc had been denied, there would have been no occasion for the en banc review.

application of the 1987 amendment and the unlawful participation of a senior judge in the decision. (App. at 16a-20a.)

When, on rehearing, the legislative history that the Federal Circuit ignored was brought to its attention, the court simply ducked the matter. Instead, it relegated Ltc. Wilson to the burden of showing in the Claims Court that he was not on a "training" tour when he was released (App. at 64a), and proceedings in the Claims Court on that issue are pending. This Petition followed.

Petitioners Green, Weissenberger, Harvey, Nelson and Olson (hereinafter "Green Petitioners") were also released from tours denominated training tours after achieving 18 years of service. The tours, in many cases, were working tours, sometimes of several months duration. In some cases, the reservist was released without having expressly requested sanctuary but also without any awareness of his sanctuary rights or the procedures for claiming them, for the regulations Section 1163(d) requires have never been issued. In other cases, the reservist requested to remain on duty, but his release was approved by the Secretary of the service concerned. The approvals, however, were not pursuant to required regulations and were issued under a general delegation of authority that even on its face had the purpose of denying sanctuary across the board and at its inception, vitiating the purpose of Section 1163(d).

The Green Petitioners challenged their releases in the Claims Court but did not prevail. Although the court ruled, as in Petitioner Wilson's case, that the Green Petitioners were on tours to which sanctuary applied, the court found that their releases were either voluntary, because Petitioners did not request that they be retained or do so in writing, or because the releases were approved by the secretary concerned. *See* Appendices D, E, F, G and H. The Green Petitioners, therefore, took appeals that were consolidated for decision by the Federal Cir-

cuit. Their appeals were also consolidated for argument with the Wilson appeal and, therefore, heard by the same panel of retired officers that heard that appeal.

The panel affirmed the Claims Court, but on the ground that reserve officers on training tours were not entitled to sanctuary. (App. at 68a.) The panel relied on the Federal Circuit's decision in the Wilson appeal and did not reach the voluntariness and validity of approval issues that Petitioners had raised on appeal. Thereafter, the panel denied rehearing, without awaiting the en banc court's decision on rehearing in the Wilson appeal, which decision gave Petitioner Wilson at least the opportunity to prove on remand that he was not being trained when he was released.

When Petitioners requested that the panel recall its mandate in light of the Federal Circuit's action on rehearing in the Wilson appeal, the panel, not to be deterred, withdrew its original decision, issued a not-to-be-published opinion, and, in a single conclusory paragraph, jettisoned reliance on the court's Wilson decision and ruled, it appears (the panel's decision is devoid of any reasoning whatsoever), that Petitioners' releases were either not involuntary or, if involuntary, were validly approved by the secretary of the service concerned. (App. at 23a.) Requests for rehearing and rehearing en banc were denied (App. at 65a, 66a), and this Petition followed.

Nothing further remains for decision in these cases. Thus, should this Court grant its writ and decide that Petitioners' releases were involuntary and not validly approved, it would also be necessary to determine whether the Federal Circuit properly construed Section 1163(d), including whether that court properly relied on the 1987 amendment to Section 1163(d) to validate actions occurring prior to 1987.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS IMPORTANT QUESTIONS REGARDING THE APPROPRIATE TREATMENT OF MILITARY RESERVISTS.

The legislative history is unmistakably clear that Section 1163(d) was intended to eliminate the abuse practiced by the armed services of withdrawing the carrot of retirement, after many years of service, as the end neared. Congress sought to provide reservists a "reasonable assurance of qualifying for retirement benefits" and contemplated that once a reservist was within two years of retirement, he "ordinarily" would be retained.[8] As the Federal Circuit itself once recognized in its own overruled *Ulmet* decision, Section 1163(d) is supposed to be a "generous benefactory statute." 822 F.2d at 1087.

Nevertheless, after applying a novel theory of statutory construction that would necessarily render most of the United States Code ambiguous, and resorting to an egregiously selective reading of the legislative history, the Federal Circuit denied the petitioner reserve officers here sanctuary rights to which they were entitled under the plain meaning of the applicable statutes.

A. The Federal Circuit Disregarded Congress's Intent to Protect Reservists from Release Before Retirement.

As this Petition later challenges, the Federal Circuit found that 10 U.S.C. § 1163(d) was ambiguous because the term "active duty" was not defined within it but elsewhere in Title 10. After so straining to find ambiguity, the Federal Circuit, as this Court has previously instructed, though in circumstances of real rather than contrived ambiguity, looked to the legislative history.[9]

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[8] 1956 Hearings, *supra*, at 3 (1956).

[9] *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *CPSC v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980).

In that history, the court did not unearth any material that it had missed in its *Ulmet* decision, where the court concluded that the military's position was not helped. *See* 822 F.2d at 1083-85. Nevertheless, the court here purported to find evidence that Congress did not intend to protect reservists on training tours. To do so, however, the court totally disregarded a critical phase of the history.

In particular, the Federal Circuit noted that when Section 1163(d) was first enacted in 1956, it was codified in Title 50,[10] which contained a pre-existing definition of "active duty" that excluded training duty.[11] (App. at 8a.) The court found, therefore, that an error occurred in 1962 when Section 1163(d) was recodified in Title 10 and became subject to the Title 10 definition of "active duty," which expressly included training tours. (App. at 11a-13a.) Accordingly, the court concluded that reservists on training tours were not entitled to sanctuary.

What the Federal Circuit conveniently and totally ignored, however, although it was fully briefed and argued,[12] were highly relevant legislative actions by Congress shortly after Section 1163(d) was first enacted—actions which, unlike those on which the Federal Circuit relied, were taken within weeks of the enactment. Specifically, the Title 50 definition of "active duty," which pre-existed, by several years, the enactment of Section 1163(d),[13] was repealed soon after Section 1163(d) was enacted—by the same Congress that enacted Section

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[10] 50 U.S.C. § 1016(d) (Supp. IV 1956).

[11] *Id.* § 901(b).

[12] Brief for Plaintiff-Appellee, at 11-13, *Wilson v. United States*, No. 89-1598 (Fed. Cir. filed Nov. 8, 1989).

[13] *See* Pub. L. No. 476, § 101(b), 66 Stat. 481 (1952).

1163(d).[14] Moreover, by the very same legislation effecting the repeal of the Title 50 definition, the Title 10 definition was specifically modified to include training tours.[15] In other words, a definition of "active duty" that could not possibly have been enacted with Section 1163(d) in mind—because it preceded Section 1163(d) by several years—was replaced by a definition modified to include training tours, virtually contemporaneously with the enactment of Section 1163(d).[16]

Reference to the broader Title 10 definition of "active duty" for Section 1163(d) purposes was the only correct course, even while Section 1163(d) was in Title 50. Not only was the Title 50 definition of "active duty" entirely repealed shortly after Section 1163(d) was enacted but also the retirement provisions to which Section 1163(d) expressly related were already codified in Title 10 and themselves relied on the Title 10 definition of "active duty."[17] The recognition of training duty for Section 1163(d) purposes, therefore, was plainly the intent of Congress. Further, it goes virtually without saying that because training tours qualified for sanctuary, the time

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[14] *See* Pub. L. No. 1028, § 53, 70A Stat. 644 (Aug. 10, 1956). Given that the Title 50 definition of active duty pre-existed Section 1163(d) by several years, it could just as easily have been concluded that a codification error occurred in 1956, when Section 1163(d) was first codified in Title 50.

[15] *See* Pub. L. No. 1028, § 101(22), 70A Stat. 5 (Aug. 10, 1956).

[16] Congress fully appreciated and intended its broadening of the "active duty" definition. The Title 10 Historical and Revision Notes for 1956 prepared by Congress observe:

> "[T]he definition of 'active duty' is based on the definition of 'active Federal service' in the source statute, since it is believed to be closer to general usage than the definition in 50:901(b), which excludes active duty for training from the general concept of active duty."

10 U.S.C. § 101, 1956 Historical and Revision Notes.

[17] *See* 10 U.S.C. §§ 101(22), 101(24), 3911, 3926(a)(1).

spent on those tours also counted toward the years of service necessary to qualify for military retirement, contrary to the Federal Circuit's ruling. (App. at 14a.)[18]

In short, legislative history that the Federal Circuit wholly ignored clearly shows that long before the 1962 recodification, indeed, virtually contemporaneously with the enactment of Section 1163(d), Congress intended "active duty" for Section 1163(d) and retirement purposes to include training tours. That Section 1163(d) was later recodified in Title 10 without excepting training tours from its coverage does not reflect a codification error in 1962 but action quite consistent with the intent of Congress in 1956. The Federal Circuit has ruled, however, that a definition Congress expressly repealed almost 35 years ago is controlling over a definition standing beside Section 1163(d) for almost twenty years. Because the Federal Circuit's decision defeats protections Congress plainly intended for this country's military reservists, including reservists on training tours, this Court should grant this Petition to decide the important question of statutory construction presented.

B. Because Congress Intended to Protect Reservists from Unfair Treatment by the Services, Petitioners' Releases Were Neither Voluntary Nor Validly Approved.

In the opinion on which it finally settled in the Green Petitioners' appeals—recall there were two issued—the panel below offered no rationale whatsover for its rul-

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[18] Indeed, when Section 1163(d) was originally considered in hearings, it was expressly recognized that reserve training duty qualified toward retirement. *See* 1956 Hearings, *supra*, at 9 (Statement by Brig. Gen. Harold R. Duffie, Retired, Executive Director of the Reserve Officer Ass'n of the United States: "We did not suggest that [the Reservist] be given as much as a Regular because his continued opportunity for participation in Reserve training could separately be credited toward his Reserve retirement"). *See also* 10 U.S.C. § 3926(a)(1).

ings on voluntariness and secretarial approval, other than to state that "the Claims Court properly applied the correct law." (App. at 23a.) In light of the procedural history in the Federal Circuit, the panel's opinion more likely reflects the expediency of its rulings and certainly not any adequate, considered or principled review of the issues raised. For purposes of the following discussion, however, it will be assumed that the panel essentially adopted the rationale of the Claims Court in the Green Petitioners' cases.

1. *The Presumption that Releases Are Voluntary, Even Absent a Knowing and Affirmative Waiver of Sanctuary, Defeats the Protection Intended for Reservists.*

Each of the Green Petitioners was released without his express consent or waiver of his sanctuary rights and without approval of the Secretary concerned, after a tour during which 18 years of service were completed, that is, within two years of retirement. The Claims Court, however, created and the Federal Circuit has apparently ratified a presumption that a release was not involuntary and, therefore, not in violation of Section 1163(d), unless the reservist expressly objected to his release, prior to the release and in writing, irrespective of whether the reservist had been reasonably apprised of his right to sanctuary. On the basis of this presumption, which finds no basis in either the language of the statute or military regulations, the Green Petitioners were deemed voluntarily released, notwithstanding their efforts to be retained once they discovered that the law protected them.

Nowhere in Section 1163(d) may one find any basis for a writing requirement, let alone a presumption of voluntariness, as opposed to an inquiry into the reservist's actual and knowing intent upon his release.[19]

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[19] The Green Petitioners were never allowed to present evidence of their intent.

Indeed, anything short of requiring a knowing and express relinquishment of sanctuary before a release may be considered voluntary would be contrary to Congress' evident intent, as discussed above, to protect reservists and provide them with a reasonable assurance of qualifying for retirement.

The aim of Congress was to "afford[] a measure of protection to the reservist who has more than 18 years of active duty."[20] It was contemplated, moreover, that "[o]rdinarily if [a reserve officer] has 18 years of service he will be retained on active duty until he can qualify for retired pay."[21] Consequently, it has been recognized that Section 1163(d) gives the "18-year reservist" a "special" or "enhanced status." *Roberts v. Vance*, 343 F.2d 236, 239 (D.C. Cir. 1964).

There is simply no protection for reservists in the manner Congress contemplated if sanctuary is made to depend on the chance that the reservist has had actual knowledge of his right to be retained on duty and, moreover, the chance that he has taken the precise steps that someone has determined, quite after the fact, are necessary to exercise that right. To make sanctuary so depend is to reduce it to little more than a game of "You Bet Your Life"—say the magic word, and then, but only then, the retirement duck flutters to the ground.[22]

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[20] Cong. Rec. S11334 (June 1956) (statement of Senator Saltonstall).

[21] 1956 Hearings, *supra*, at 4.

[22] *See Santora v. United States*, 10 Cl. Ct. 38, 40 (1986) (under statute providing for severance pay upon involuntary separation, "voluntariness is a question of fact"). Similarly, the principle that no waiver is voluntary unless it is knowing and actually intended is basic. *See CBS, Inc. v. Merrick*, 716 F.2d 1292, 1295 (9th Cir. 1983) ("Waiver is the intentional relinquishment of a known right with knowledge of its existence and the intent to relinquish it"); *United States v. Stout*, 415 F.2d 1190, 1192 (4th Cir. 1969) ("The validity of . . . a broad presumption of waiver provision is highly

Of course, Ltc. Wilson and Ltc. Ulmet did say the magic words, but the Army's response was still that reservists do not get sanctuary.

Nevertheless, the Claims Court argued in the *Green* cases that:

> "it is only reasonable that the Army first obtain a Reserve member's request for an extension and resulting knowledge of the member's willingness and ability to continue on active duty before it can be assessed liability for continuing back pay on the basis that the expiration of the training tour of duty ordered resulted in an 'involuntary' release."

(App. at 38a-39a). The fallacy in this reasoning, however, is that the Army has only itself to blame for being liable for back pay. The Army could readily have avoided liability if it had honored Petitioners' sanctuary rights and apprised them of their rights when they accrued, pursuant to, for example, the regulations that Section 1163(d) directs the services to promulgate but that have never been promulgated. Then, if the reservist had been apprised of his right, he would have asserted it, or at least expressly declined not to if it were truly his choice to be released.

In short, although there were releases here that occurred without express objection, in no instance was there any showing that the reservist willingly went off duty with knowledge of his sanctuary rights. These releases, therefore, were not voluntary and were, instead, in direct violation of Section 1163(d). Because the Federal Circuit's decision imposes requirements for invoking sanctuary that subvert the protection Congress

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questionable because federal law is well-settled that waiver is the voluntary and intentional relinquishment of a known right . . ."); *Peterson v. S.S. Wahcondah*, 331 F.2d 44, 48 (5th Cir. 1964) ("A waiver may be defined as the intentional relinquishment of a known right with both knowledge of its existence and an intention to relinquish it").

plainly intended for reservists, this Court should grant this Petition to decide the important questions that those requirements present.

2. *The Secretarial Approvals of Petitioners' Releases Were Improperly Aimed at Defeating the Protection that Congress Intended.*

The Federal Circuit ruled that even those releases it considered involuntary were lawful, because they had been approved by the Secretary of the service concerned. The court erred on two grounds, however, neither of which the court bothered to address in its perfunctory one-paragraph ruling, although they were fully briefed. First, Section 1163(d) requires that the approval be made pursuant to established uniform regulations, but the services have never issued any of the required regulations. Second, the purpose of the approvals in these cases was to achieve exactly what Section 1163(d) was enacted to prohibit—releases preempting retirement. Whatever may be the secretarial authority to approve a release, it is not authority to repeal the statute.

Recalling that the purpose of Section 1163(d) was to stop abuse by the military with regard to retirement incentives,[23] it is apparent why Section 1163(d) requires that approval of an involuntary release be pursuant to "regulations . . . prescribed by the Secretary concerned, which shall be as uniform as practicable." Without such regulations, secretarial authority to release a reservist would be virtually unbridled and unreviewable, as, in turn, would be the ability to circumvent the protective purpose of Section 1163(d). *See Sampson v. Murray*, 415 U.S. 61 (1974); *Woodward v. United States*, 871 F.2d 1068, 1071 (Fed. Cir. 1989). Indeed, it has been held that § 1163(d) specifically directs the Secretary to promulgate regulations to implement the 18-year reservist's enhanced status." *Roberts v. Vance*, 343 F.2d at 239.

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[23] *See* discussion, *supra*, pp. 3-4.

Because the Green Petitioners were denied the statutorily mandated protection of regulations limiting secretarial authority and, in turn, the ability to circumvent Section 1163(d), their releases were unlawful.[24]

Even if the approvals of the involuntary releases here were not procedurally defective, the releases would still be unlawful. It is apparent that the Green Petitioners' involuntary releases were approved because the Secretary concerned did not wish to comply with Section 1163(d), not because of any consideration of Petitioners' qualifications or ability to remain on active duty. In particular, the delegation of authority from the Secretary of the Army, pursuant to which three of the four approvals here were made, candidly sought to interdict the "increasing number of [reservists] who are on [training] and as a result of [the *Ulmet*] interpretation may now fall within the scope of Section 1163(d)." [25] The Secretary of the Army, therefore, delegated approval authority in order to implement:

> "a policy which provides that soldiers who are on short training tours . . ., who request retention on active duty under Section 1163(d) will, notwithstanding that request, be released from active duty upon termination of their existing tours unless it is determined that continued retention on active duty is in the best interests of the Army." [26]

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[24] *See Dilley v. Alexander*, 603 F.2d 914, 923 (D.C. Cir. 1979) (Army was not free to ignore or facilely characterize as permissive a statutory directive to establish selection boards in such a manner as would protect reserve officers from the bias of regular Army officers).

[25] Memorandum from Lt. Gen. Allen K. Ono for Secretary of the Army, dated October 31, 1987, at 244 of Joint Appendix below.

[26] *Id.* Petitioners Wilson, Green and Olson, however, like many other reservists who have been released, were on tours of several months duration, not short tours by any standard, and they were working, not being trained, on these tours.

This policy reflects nothing more than precisely what Congress sought to prohibit in enacting Section 1163(d) —the wholesale release of reservists on the threshold of retirement because, while it was convenient for the Army to enjoy Petitioners' continued services, it was not convenient for the Army to retire them with full benefits.[27]

The insidious thrust of the armed services' approval policy simply cannot be squared with what was plainly Congress' aim to give reserve officers a "reasonable assurance of qualifying for retirement benefits" [28] and its expectation that "[o]rdinarily if [a reserve officer] has 18 years of service he will be retained on active duty until he can qualify for retired pay." [29] Whatever may be the scope of secretarial approval authority under Section 1163(d), it is not the authority, as attempted here, to repeal that provision. This Court should grant this Petition and review the Federal Circuit's decision upholding administrative actions aimed at subverting laws that Congress established for protecting this country's military reservists.

II. THIS CASE PRESENTS IMPORTANT QUESTIONS REGARDING PRINCIPLES OF STATUTORY CONSTRUCTION.

A. The Federal Circuit Has Misapprehended Statutory Ambiguity.

The Federal Circuit determined that, at the time Petitioner Wilson completed 18 years of service, the meaning of Section 1163(d) was unclear, allowing the court to

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[27] The Air Force's action releasing Petitioner Nelson was equally objectionable. Instead of disapproving Petitioner Nelson's release on account of manpower or other legitimate considerations, "the Acting Secretary of the Air Force disapproved Lt Col Nelson's request for sanctuary under 10 USC 1163d," pure and simple. Memorandum from Col. William P. Carter to 4 AF/DP, dated July 14, 1988, at 197 of the Joint Appendix below.

[28] 1956 Hearings, *supra*, at 3.

[29] *Id.* at 4.

consider legislative history. (App. at 11a.) The meaning was allegedly unclear because the term "active duty" in Section 1163(d) was not defined in Section 1163(d). The term, however, was defined elsewhere in Title 10, specifically, in the "Definitions" section, which expressly stated that its definitions "apply in this title." 10 U.S.C. § 101(22). The applicability of the Title 10 definition of "active duty" to Section 1163(d) of Title 10, therefore, was crystal clear.

There was no confusion about where to find the needed definition—in the "definitions" section—or about the terminology—precisely the same term was used in the definitions and Section 1163(d). Indeed, in *Ulmet*, the Federal Circuit had previously determined that Section 1163(d) was clear.

The Federal Circuit seems to have incorrectly equated the need for statutory construction with the existence of ambiguity. Not all statutory provisions needing construction, however, are ambiguous. Here, the solution to the construction problem, if any, facing the court was quite straightforward: check the definitions expressly given in the same title of the Code. The court's failure to take this obvious and well-settled approach to construction [30] suggests, again, more the result orientation of its decision than any principled application of the law.[31]

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[30] *See* 73 *Am. Jur. 2d* Statutes § 225 (1974):

> "The lawmaking body's own construction of its language, by means of definitions of the terms employed, should be followed in the interpretation of the act or section to which it relates and is intended to apply."

See also Matter of Thalheim, 853 F.2d 383, 387 (5th Cir. 1988) ("It is a basic principle of statutory construction that specific words within a statute may not be read in isolation from the remainder of the entire statutory scheme"); 2A *Sutherland Statutory Construction* § 46.05, at 90 (C. Sands 4th ed. 1984); *id.* § 47.07, at 133.

[31] The Federal Circuit's determination that the meaning of "active duty" was unclear in 1984, when Petitioner Wilson completed

Moreover, the notion that a statute is unclear because terms it contains are defined elsewhere in a statutory codification has profound and unsettling implications. Definitional reference is a common mode throughout the United States Code. Just a few examples are the Internal Revenue Code, 26 U.S.C. § 7701; the Criminal Code, Title 18; Social Security programs, 42 U.S.C. §§ 301-1397f; the copyright laws, 17 U.S.C. § 101; veteran benefits laws, 38 U.S.C. § 101; labor standards laws, 29 U.S.C. § 203; and laws related to the management of public property, 40 U.S.C. § 472. If, on account of the approach to construction employed by the Court in its opinion here, provisions throughout the United States Code are now to be deemed unclear, there will be no end to the statutory construction mischief and work for this and other courts, let alone administrative agencies, that will be wrought by future litigants. The Court should grant this Petition to review the unsettling and unprecedented principle of statutory construction the Federal Circuit has announced.

B. The Federal Circuit Improperly Gave Retroactive Effect to a Subsequent Enactment.

This Court has stated categorically that "[r]etroactivity is not favored in the law" and that "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988). In so stating, the Court disregarded a line of cases represented by its earlier decision in *Bradley v. School Board*, 416 U.S. 696 (1974), where

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18 years of service (App. at 11a), is also grotesquely at odds with its determination elsewhere in its opinion that the meaning of "active duty" was clear when Section 1163(d) was first enacted in 1956. (App. at 8a, 10a, 11a.) As discussed above (pp. 10-12), when it was first enacted, Section 1163(d), as in 1984, did not contain a definition for "active duty." If anything is truly unclear, therefore, it is why, according to the court, the meaning of "active duty" in 1956 was clear when it was not clear in 1984.

the Court in a civil rights case ruled that the Court of appeals properly awarded attorneys fees on the basis of a law enacted while the case was on appeal.

Most recently, in *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, —— U.S. ——, 110 S. Ct. 1570 (1990), the Court declined to give retroactive effect to legislation governing post-judgment interest. Four members of the Court found it unnecessary finally to bury *Bradley*, ruling that the language of the legislation clearly evidenced a congressional intent against retroactive application. Justice Scalia, however, the fifth vote of the 5 to 4 majority, stated he "would have taken the occasion to admit that the rule we expressed in . . . *Bradley* was wrong, and to reaffirm the clear rule of construction that has been applied, except for these last two decades of confusion, since the beginning of the Republic and indeed since the early days of the common law: absent specific indication to the contrary, the operation of nonpenal legislation is prospective only." *Id.* at 1579.

As noted, after and in express response to the Federal Circuit's *Ulmet* decision but prior to its decision in Petitioner Wilson's case, the services had Section 1163(d) amended to insert the words "other than for training" after the words "active duty," thereby giving the latter term a meaning contrary to the definition applicable to all other provisions in the title where Section 1163(d) is codified.[32] The services then argued, and only argued, below that the amendment had to be given retroactive effect, relying on *Bradley*. In its opinion in Petitioner Wilson's appeal, the Federal Circuit ostensibly claimed that it was not giving retroactive effect to the amendment (*see* App. at 14a n.6), perhaps thereby intending to insulate its decision from this Court's current interest in the matter of retroactivity. The Federal Circuit's

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[32] *See* Pub. L. No. 100-224, 101 Stat. 153B (Dec. 30, 1987); 133 Cong. Rec. S18334 (daily ed. Dec. 17, 1987).

analysis, however, shows that it did give retroactive effect to the amendment.

In particular, the Federal Circuit gave considerable weight to the amendment, despite this Court's repeated admonitions that the expressions of a subsequent Congress carry little if any weight in construing a prior enactment, particularly when the enactment is 30 years old and has already once been judicially construed.[33] The court repeatedly noted and relied on its view that the amendment provided clear evidence of legislative intent when Section 1163(d) was enacted 30 years earlier. (*See* App. 10a, 11a, 14a n.6). In short, by purporting to construe the original version of Section 1163(d), the Federal Circuit ostensibly avoided retroactive application of the amendment, while all the while looking to that amendment to justify its result.

Neither the amendment on its face nor anything in its legislative history, however, suggests that the amendment is to be applied retroactively. The terse language of the amendment says absolutely nothing about retroactive effect. It merely states that the phrase "other than for training" is to be added to Section 1163(d), thereby excluding training from the meaning of "active duty" in that provision, but indicating nothing about retroactive effect.

Because of the furtive manner in which the services had it enacted—as a rider in the eleventh hour of a budget crisis during the midst of the holiday season—the only legislative history available is the floor statements of two legislators. Such statements, however, are to be

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[33] *See Jefferson County Pharmaceutical Ass'n v. Abbott Labs*, 460 U.S. 150, 165 n.27 (1983); *United States v. Price*, 361 U.S. 304, 313 (1960). *See also United Air Lines, Inc. v. McMann*, 434 U.S. 192, 200 n.7 (1977) ("Legislative observations 10 years after passage of the Act are in no sense part of the legislative history").

given little, if any, weight,[34] and in any case, the particular statements here are wholly silent as to retroactive effect.[35]

In short, the Federal Circuit effectively gave retroactive effect to the service's amendment of Section 1163(d), even though neither the language of the amendment nor its legislative history shows that it was intended to be applied retroactively. This Court should grant this Petition and decide the proper application of a subsequent legislative enactment in these circumstances.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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March 14, 1991

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[34] *See Weinberger v. Rossi*, 456 U.S. 25, 35 (1982); *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979).

[35] *See* 133 Cong. Rec. S18334 (daily ed. Dec. 17, 1987) (statement of Senator Glenn); 133 Cong. Rec. H11509-10 (daily ed. Dec. 16, 1987) (statement of Representative Byron).

APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

89-1598

LIEUTENANT COLONEL ALBERTIS WILSON,
Plaintiff-Appellee,

v.

THE UNITED STATES,
Defendant-Appellant.

Decided: October 19, 1990

Before NIES, *Chief Judge*, RICH, MARKEY*, *Circuit Judges*, BENNETT**, *Senior Circuit Judge*, NEWMAN, ARCHER, MAYER, MICHEL, PLAGER, LOURIE, and CLEVENGER, *Circuit Judges*.

PLAGER, *Circuit Judge*.

In this case, plaintiff, an officer in an Army reserve component, sought back pay, retirement pay, reinstate-

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* Circuit Judge Markey vacated the position of Chief Judge on 27 June 1990, and was succeeded by Judge Nies.

** This case was taken in banc by vote of the active judges. It was initially heard by a panel consisting of Judges Markey, Plager, and Senior Judge Bennett. A majority of the court being of the view that 28 U.S.C. § 46(c) does not bar such participation, once the in banc court was convened Senior Judge Bennett, as a member of the panel, participated in the subsequent in banc proceedings.

ment and correction of records. His claim was based on 10 U.S.C. § 1163(d), the "sanctuary" provision, which provides that members of a reserve component are, under specified circumstances, protected from involuntary release prior to qualifying for retirement. Before us is an appeal from a judgment of the Claims Court entered May 22, 1989, and reported as *Wilson v. United States*, 16 Cl.Ct. 765 (1989). Both Lieutenant Colonel (LTC) Wilson and the United States moved in the trial court for summary judgment. LTC Wilson's motion was based on a decision of this court, *Ulmet v. United States*, 822 F.2d 1079 (Fed. Cir. 1987). The Claims Court granted LTC Wilson's motion, holding that he is entitled to sanctuary under § 1163(d). The United States appealed pursuant to 28 U.S.C. § 1295(a)(3). We reverse.

I. The Factual Background

Wilson enlisted in the United States Army on July 5, 1963. In 1965, he received a commission as a second lieutenant in the United States Army Reserve; in 1966 his reserve commission was converted to one in the Regular Army. On February 1, 1980, with the rank of captain, but having twice failed selection to the rank of major, Wilson was discharged from the Regular Army. At the time of his discharge, Wilson had served over sixteen years on active duty.

Subsequently, Wilson became a member of the Army Reserve and attained the rank of lieutenant colonel. After performing several active duty for training tours, Wilson received orders to report by October 3, 1983 to Fort McPherson, Georgia, for a special active duty for training (SADT) tour[1] of 179 days, to and including March 28, 1984.

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[1] Active duty for training tours range in duration from 1 to 179 days. According to the Government, the Department of Defense defines "Active Duty for Training (ADT)" as:

> An ADT tour under orders providing for automatic reversion to inactive duty status when the specified period of ADT is

While serving on the SADT tour, LTC Wilson wrote to Army headquarters in Washington, D.C. requesting that, because he had now completed more than 18 qualifying years of Army service, he be retained on active duty pursuant to the "sanctuary" provision of 10 U.S.C. § 1163(d). If the Army responded to LTC Wilson's letter, it is not of record. On March 28, 1984, when his SADT tour expired, LTC Wilson was released from his tour of active duty for training and returned to civilian status.

On August 10, 1984, Wilson submitted a request that he be recalled to active duty in order to complete 20 years of service for retirement purposes. Army officials disapproved this request by a written response dated October 5, 1984.

On January 5, 1985, Wilson's counsel wrote the Secretary of the Army requesting that Wilson be reinstated to active duty so that he could complete his 20 years of active duty and retire with benefits. By a letter dated February 22, 1985, William D. Clark, Principal Deputy Assistant Secretary (Manpower and Reserve Affairs), provided LTC Wilson's attorney, Avery T. Salter, the basis for the Secretary's denial of LTC Wilson's request, stating (in relevant part):

> Section 1163(d), 10 United States Code, does not give Reserve members who complete 18 years of active federal service (AFS) while on Active Duty for

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completed. ADT incudes full-time attendance at formal specialized skill training, flight training, combat crew training, and professional development education programs intended to provide RC [Reserve Component] members with necessary skills and disciplines supporting RC missions. Special AD [Active Duty] for activities having a primary training content also is authorized as ADT [Special Active Duty for Training (SADT)].

Brief for Appellant at 5 n.5 (citing Department of Defense Directive No. 1215.6, Uniform Reserve, Training and Retirement Categories).

> Training (ADT) or Special Active Duty for Training (SADT) the right to be continued on active duty solely for the purpose of completing 20 years of service for retirement purposes. Officers on ADT/SADT should understand that future service in an ADT/SADT status is based upon valid requirements as determined by the Department of the Army rather than upon the amount of AFS accumulated by the officer.
>
> While Major Wilson is not automatically entitled by law to further active duty, he is neither precluded from such service. However, future service depends upon the existence of a valid requirement and Major Wilson's selection as the best qualified officer available. The Department of the Army retains the right to make such determinations.

On August 13, 1987, Wilson filed a complaint in the Claims Court seeking back pay, allowances and benefits from March 27, 1984, reinstatement to active duty, records correction and other relief. On October 14, 1988, the Claims Court issued an interlocutory order, as to liability only, in Wilson's favor on cross motions for summary judgment. The Government petitioned this court for interlocutory review. In an order dated November 18, 1988, we denied the Government's petition. Thereafter, the parties filed stipulated facts as to quantum in the Claims Court. On May 22, 1989, the Claims Court issued its final decision granting Wilson's motion for summary judgment, incorporating therein "with limited modifications" its prior interlocutory order of October 14, 1988. *Wilson v. United States*, 16 Cl.Ct. at 766 n.1. The Claims Court held, *inter alia*, that: under *Ulmet v. United States*, 822 F.2d 1079 (Fed. Cir. 1987), § 1163 (d) entitled LTC Wilson to sanctuary; LTC Wilson, having affirmatively sought sanctuary under § 1163(d), was "involuntarily" released from service as that term is used in § 1163(d); and LTC Wilson's involuntary release was not approved by the Secretary in accordance with § 1163(d).

II. The Legal Background

A.

Although the details of each Service's program may vary, tailored as they are to meet the differing needs of the particular Service, the basic structure of the Federal Government's plan for eligibility for retirement of military officers is fairly straightforward. The plan addresses two basic categories of officers. There are career officers who complete twenty or more years of full-time active military service. These officers typically enter through one of the Service academies or through one of the special officer training programs designed for that purpose.[2] These officers usually are given "regular," as distinct from "reserve" commissions, although some number of officers with initial "reserve" commissions remain in the service and make it a career.

By law and regulation, these full-time career officers, both regular and reserve, are entitled to retire from the Service, regardless of age, with a substantial pension upon completion of twenty or more years of service. *See* 10 U.S.C. §§ 3911 & 3991 (1988).

The system also provides retirement benefits for officers who, although not making a career of military service, complete the requisite number of years of creditable federal service. These may be officers who began with regular commissions and later decided not to make a career of the Service or are terminated involuntarily, but choose to remain affiliated, or they could be officers with an initial reserve commission who, upon completion of their full-time active duty obligation, remain active with a reserve component.

This second group of officers, reserve component officers, all of whom will hold commissions in the reserve, may be placed in the active reserve, where, while holding civilian jobs, they regularly drill evenings or week-

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[2] Career officers may also be recruited from the enlisted ranks.

ends as part of the country's citizen soldiery. The purpose is to have a cadre of trained and ready civilians able to augment the full-time forces in time of national need. As part of their readiness training, these officers typically go on an annual period of active duty for training, during which they work side-by-side with their full-time active duty counterparts.

Individuals who serve in these reserve components and who earn a total of twenty or more years of qualifying federal service—combining the active duty years with years of qualifying reserve time—are also eligible for a federal pension. Here, though, the pension is considerably less generous: it cannot be drawn until the retired reservist attains age 60, and the monthly stipend is only a fraction of that paid to the career officer who retires with twenty or more years of full-time service. *See* 10 U.S.C. §§ 1331, 1333 & 1401 (1988).

As a general proposition, whether an officer is retained on either full-time active service or in the reserves after an initial period of full-time active service, is a matter largely in the discretion of the Service concerned, based on the needs of that Service and its applicable rules and regulations, subject of course to governing law.

B.

In 1956, the Congress amended the Armed Forces Reserve Act of 1952 (AFRA), Act of July 9, 1956, Pub. L. No. 84-676, § 265, 70 Stat. 517, by adding a new section, initially codified as Section 1016 of title 50 of the United States Code. Section 1016 had eight subsections, and, according to the Senate Committee report, had two purposes. One was to provide readjustment payments to reservists who were involuntarily released from full-time active duty after an extended period of time in service. The other was to provide some degree of economic security as an inducement to reservists to stay on active duty, thus reducing unwanted attrition and its attendant costs to the Government. The statute did this by providing both

readjustment payments to those ushered out before they completed eighteen years of active service, and a guarantee against involuntary separation for those who completed eighteen years, assuring them that they would get their "twenty." This latter purpose was accomplished by subsection (d), which provided that:

> Under regulations prescribed by the appropriate Secretary, which regulations shall be as uniform as practicable, a member of a reserve component who is on *active duty* and is within two years of qualifying for retired pay, retirement pay, or retainer pay under any purely military retirement system, shall not be involuntarily separated from that duty before he qualifies for that pay unless his separation is approved by the appropriate Secretary.

50 U.S.C. § 1016(d) (Supp. IV 1956) (emphasis added).

Subsection (b) of § 1016 provided specific exclusions from "any payments" provided by the provisions of § 1016, one of which exclusions was "A person who is released from active duty for training." [3] In addition, at

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[3] 50 U.S.C. § 1016(b) (Supp. IV 1956), in pertinent part, provided:

> *(b) Persons not entitled to payment.* (Emphasis in original)
>
> The following persons are not entitled to any payments under this section:
>
> (1) A person who is released from active duty at his own request.
>
> (2) *A person who is released from active duty for training.* (Emphasis added).
>
> * * * *

It is arguable that subsection (b) was not intended to apply to subsection (d). Subsection (b) refers to "any payments." While the consequences of the guarantee under subsection (d) are retirement payments, the subsection itself is in the nature of a guarantee of opportunity for eligibility for payments. These two subsections are discussed in the legislative history as follows:

> The proposal is designed primarily to provide a *readjustment payment* for Reserve officers involuntarily released from ac-

the time this section was added to AFRA as part of title 50, § 101(b) of title 50 defined active duty as "full-time in the active military service of the United States, *other than active duty for training.*" (Emphasis added). The Congressional purpose was clear: if a Service permitted an officer holding a reserve commission to serve on full-time active duty for eighteen years, it could not then terminate that officer's active duty assignment so as to deny the officer the opportunity to complete his or her twenty years and obtain the more desirable federal pension.

There are various explanations for this sanctuary provision. As officers rose in rank, a function of, among other things, time in service, the opportunities for promotion diminished—the rank structure is pyramidal. Whether regular officers were favored for retention and promotion over reserve officers is a matter of conjecture. In any event, the Congressional policy was clearly that if reserve commission officers were to be passed over for promotion and retention, at least they could, after enough years, be guaranteed their retirement. In addition, the early 1950's, when the sanctuary provision was enacted, was also a time when many reservists from World War

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tive duty; the following classes of persons would not be entitled to such payments: * * * (2) those released from active duty for training; * * * *.

By *special provision*, a Reserve officer on active duty and within 2 years of qualifying for retired or retirement pay could not be involuntarily separated from active duty before he so qualifies except with the approval of the Secretary of the military department concerned.

Acceptance of readjustment pay would not deprive a person of any retired or retirement pay or other retirement benefits from the United States to which he would otherwise become entitled. * * * *.

S. Rep. No. 2288, 84th Cong., 2d Sess. 2, *reprinted in* 1956 U.S. Code Cong. & Admin. News 3061, 3066 (letter from Robert T. Stevens, Secretary of the Army, to Hon. Sam Rayburn, Speaker of the House of Representatives (June 4, 1955)) (emphasis added).

II who had remained in the active reserve were recalled to active duty in Korea. The possibility of completing twenty full-times years was now a viable alternative. While there was no magic to eighteen years as the cut-off, it provided a bright line for which to shoot.

In 1962, § 1016 of title 50 was recodified into title 10. In the recodification, § 1016 was severed so that subsections (a), (b), (c) and (f), (g), (h) became § 687 (a-e), and subsection (d) became § 1163(d). Congress made some minor changes in the language of the statute, none of which were meant to change the substantive effect of the statute.[4] The 1962 version of § 1163(d) read:

> Under regulations to be prescribed by the Secretary concerned, which shall be as uniform as practicable, a member of a reserve component who is on active duty and is within two years of becoming eligible for retired pay or retainer pay under a purely military retirement system, may not be involuntarily released from that duty before he becomes eligible for that pay, unless his release is approved by the Secretary.

10 U.S.C. § 1163(d) (Supp. IV 1962).

At the time § 1016(d) of title 50 was recodified as § 1163(d) of title 10, § 101(22) of title 10, in contrast

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[4] The Senate Report states:

> This bill, as amended, is not intended to make any substantive change in existing law. Its purpose is to bring up to date title 10 of the United States Code, by incorporating the provisions of a number of public laws that were passed while the bill to enact title 10 into law was still pending in the Congress and to transfer to title 10, provisions now in other parts of the code.
>
> * * * *
>
> Some changes in style and form have been made to conform the provisions to the style and form of title 10 as it now exists, but these changes do not affect the substance of any of the laws dealt with.

S. Rep. No. 1876, 87th Cong., 2d Sess. 2, *reprinted in* 1962 U.S. Code Cong. & Admin. News 2456.

to § 101(b) of title 50, defined active duty to *include* duty for training. Other than the general comment that no substantive change was intended, Congress gave no recorded recognition to this difference.

Finally, in 1987, § 1163(d) of title 10 was amended by insertion of a parenthetical phrase to expressly provide that active duty does not include active duty for training. Section 1163(d) now reads:

> Under regulations to be prescribed by the Secretary concerned, which shall be as uniform as practicable, a member of a reserve component who is on active duty (other than for training) and is within two years of becoming eligible for retired pay or retainer pay under a purely military retirement system, may not be involuntarily released from that duty before he becomes eligible for that pay, unless his release is approved by the Secretary.

10 U.S.C. § 1163(d) (1988).

III. Discussion

A.

The issue before us is how should the sanctuary provision of § 1163(d) be read during the intervening years of 1962 to 1987. It is clear that at the time of its enactment, in 1956, and until the 1962 recodification, the sanctuary provision—originally codified as subsection (d) of section 1016 of title 50—by the terms contained in subsection (b) of the same section and consistent with the general definition found in § 101 of title 50, applied only to members of a reserve component on active duty other than active duty for training. And since 1987, the Congress, upon having the issue called to its attention, reaffirmed this original intent by adding clarifying language specifically limiting sanctuary to members on active duty other than for training. In the interim—that is, between 1962 and 1987—as a result of the 1962 recodification, the sancutary provision stood severed from the remainder of original § 1016, and in a different title

(title 10). As such it no longer was adjacent to the limiting exclusions of its original subsection (b), and it now was contained in a title with a definition of active duty that included active duty for training.

In deciding the question before us, we begin as in any case of statutory construction with the words of the statute. At the time in question—1984—the statute used the phrase "on active duty," and there was no controlling definition expressly provided in the specific statutory section. There are a variety of types of active duty—the active duty on which a career member serves full-time, the active duty for training on which reservists are ordered for reserve training, the activty duty for training referred to as special active duty—and the decision as to which is encompassed in the phrase "active duty" is the issue before us; the Congress can hardly be said to have provided us with a plain meaning on the face of the statute.

Yet the problem of ascertaining Congressional intent in this case is not difficult. We are not confronted with lengthy and conflicting committee reports, floor colloquies, and other secondary materials from which we are to divine the intent of the full body of the Congress. Instead we have the clear language of the statute at the time of its enactment, consistent with the definition of the term found in title 50. And we have the clear language of the 1987 amendment, designed to clarify what had been made unclear by the 1962 codifier's reshuffling of the sections. *Cf. Bell v. New Jersey*, 461 U.S. 773, 784 (1983) ("the view of a later Congress does not establish definitively the meaning of an earlier enactment, but it does have persuasive value"). The legislative history, if recourse is even needed, is entirely consistent. The House report accompanying the 1962 codification made clear that no substantive change was intended. The sponsors of the 1987 clarification described the added language as necessary to restore the original intent to the language of the section.

This case is not unlike *Cass v. United States*, 417 U.S. 72 (1974), in which the Supreme Court construed another provision that was codified in title 10 in 1962. In 1956, Congress enacted a readjustment pay provision, Act of July 9, 1956, Pub. L. No. 84-676, § 265(a), 70 Stat. 517, that granted to certain involuntarily released members of a reserve component having "at least five years of continuous active duty" a readjustment payment computed in part upon the members' "years of active service." *Id.* at 73 & 79. For purposes of computing the "years of active service" in determining the amount of readjustment payment, Congress provided the following rounding provision: "For the purposes of computing the amount of readjustment payment (1) a part of a year that is six months or more is counted as a whole year, and a part of a year that is less than six months is disregarded . . . ." *Id.* at 79. In 1962, the language of the 1956 act was codified into § 687(a) of title 10, at which time the rounding provision, which became § 687(a)(2), was changed to read: "*For the purposes of this subsection*— . . . (2) a part of a year that is six months or more is counted as a whole year, and a part of a year that is less than six months is disregarded . . . ." *Id.* at 73-74 (emphasis added). In effecting the codification, Congress made it clear that it did not intend to make any substantive changes to existing law. *Id.* at 81.

The petitioners in *Cass* argued that, because the language of the rounding provision was changed to read "[f]or the purposes of this subsection," it applied not only to the manner of computing the amount of the readjustment payment, but now it also applied to determining when a member became eligible, i.e., had "at least five years of continuous active duty." In other words, the petitioners were of the opinion that as a result of the codification changes the rounding provision modified the word "years" whenever it was used in § 687(a). Under their interpretation, a member of a reserve component who accrued more than four years and six months, but less than five years, of continuous active service would

be entitled to reajustment pay under § 687. The Court held otherwise, however, based, *inter alia*, on the ground that Congress did not intend to make any substantive changes to the law through the course of codification of the statutes. *Id.* at 81-82.

The Secretary of the Army's long-standing interpretation of § 1163(d)—that Service members on ADT are not entitled to sancutary—provides an independent basis on which we might reach the same conclusion.[5] *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984) (when a statute is silent or ambiguous with respect to the specific issue, the administrative agency's interpretation, if reasonable, is to be followed by the court).

In the face of a consistent record of Congressional intent, to the extent that intent has been expressed, and in light of the Army's consistent, reasonable interpretation of the statute, *see Chevron, supra*, we conclude that, from its enactment to the present day, the sanctuary provision had one and only one meaning. It applies to a member of a reserve component who is on active duty other than for training, and not to one who, at the relevant time, is on active duty for training (or one of the variants thereof).

B.

The Claims Court in addressing the question of whether LTC Wilson had qualified for sanctuary considered that the issue of his basic eligibility under the statute had been settled by our decision in *Ulmet v. United States*, 822 F.2d 1079 (Fed. Cir. 1987). In *Ulmet*, the issue was whether a reserve officer could tack active duty for training service on to his prior active duty service (not for training) in order to qualify for sanctuary under 10

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[5] *See, e.g.*, Letter from James D. Hopson, LTC., U.S. Army Congressional Coordinator, to Senator Rudy Boschwitz (Dec. 23, 1987); Letter from William D. Clark, Principal Deputy Assistant Secretary, to Avery T. Salter, Jr. (Feb. 22, 1985); and Army Reg. 135-200, ¶ 4-7(b)(4) (1983).

U.S.C. § 1163(d) (1982). *Id.* at 1081. This Court reviewed the legislative history of § 1163(d) and held "that the time served by LTC Ulmet on active duty for training is to be included in computing the time required for sanctuary under section 1163(d), and retirement under 10 U.S.C. § 3911." *Id.* at 1087.

The court discussed and rejected the Government's argument regarding the legislative history of § 1163(d), and declined to give weight to the prior administrative and judicial construction that had been given to the section. Though the specific factual issue in *Ulmet* was different from that being considered today, the underlying legal issue is indistinguishable. We have revisited the legislative history of § 1163(d) in this case. Our examination has brought to light that the legislative history of the sanctuary provision demands a different result from that reached in *Ulmet*. Accordingly, *Ulmet* is overruled.[6]

IV. Conclusion

We hold that the phrase "on active duty" in 10 U.S.C. § 1163(d) does not include active duty for training. LTC Wilson was not, by virtue of his being on active duty for

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[6] The dissent's solicitous concern for *stare decisis* is well stated but misplaced. The problem is not that we here overrule *Ulmet*, but that *Ulmet* overruled a longstanding administrative practice of the Government based on an interpretation of statutes going back more than thirty years. That this longstanding interpretation was what Congress intended was clearly evidenced by its 1987 amendment. We disagree with the dissent that this was not an intervening legislative development which removed or weakened the 'conceptual underpinnings' of an earlier decision (quoting from *Patterson v. McLean Credit Union*, 491 U.S. —— (1989)); the intervening legislative development destroyed them. As the dissent correctly observes, "Our duty is to apply what Congress enacted . . . ."

The question of the retroactive effect, if any, of the 1987 amendment on other cases is not before us. Retroactivity has no bearing on this case, and thus the dissent's discussion of the issue is not on point.

training while a member of a reserve component, on active duty for purposes of § 1163(d), and is therefore not entitled to sanctuary under that provision. The decision of the Claims Court is reversed.

REVERSED.

Archer, *Circuit Judge*, concurs in the result.

MAYER, *Circuit Judge*, dissenting.

In my view there are two profound errors in the court's disposition of this case. First, it violates the sound jurisprudential precept of *stare decisis*: when a court makes a decision, especially construing a statute, it should not revisit the issue absent extraordinary circumstances. Second, for the reasons amply explained in *Ulmet v. United States*, 822 F.2d 1079 (Fed. Cir. 1987), whatever Congress thought it was doing when it revised 10 U.S.C. § 1163(d) in 1962, and notwithstanding the Army's wishful administrative gloss, the statutory language does not support today's belated interpretation.

Only recently, in *Patterson v. McLean Credit Union*, 491 U.S. ——, ——, 109 S. Ct. 2363, 2370 (1989), the Supreme Court reemphasized the importance of *stare decisis* in preserving the rule of law and in ensuring that its evolution is not subverted by arbitrariness:

> The Court has said often and with great emphasis that "the doctrine of *stare decisis* is of fundamental importance to the rule of law." Although we have cautioned that "*stare decisis*" is a principle of policy and not a mechanical formula of adherence to the latest decision," it is indisputable that *stare decisis* is a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon "an arbitrary discretion."
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> Our precedents are not sacrosant, for we have overruled prior decisions where the necessity and propriety of doing so has been established. Nonetheless, we have held that "any departure from the doctrine of *stare decisis* demands special justification." We have said also that the burden borne by the party advocating the abandonment of an established precedent is greater where the Court is asked to overrule

> a point of statutory construction. Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done. [Citations omitted.]

To be sure, the Court posited situations that might be seen as special justification for overruling an earlier construction of a statute, *id.* at ——, 109 S. Ct. at 2370, but none of them applies here. Our court alludes to the 1987 amendment to section 1163(d), but does not suggest that it purported to change the statute as it stood between 1962 and 1987. At best some of the legislative history suggests an attempt by one or two legislators to give a meaning to the law its wording will not sustain. The fact is, however, that in the 1962 recodification "active duty for training" was included in the definition of "active duty." The drafters may not have intended a substantive change, but that is what they wrought. This is not an intervening legislative development which removes or weakens the "conceptual underpinnings" of an earlier decision, *id. at* ——, 109 S. Ct. at 2370, the nearest thing to justification for today's ruling. Whether the 1987 amendment undercut *Ulmet*'s conceptual underpinnings would depend on whether it were effective retroactively. If so, *Ulmet* would be superseded; if not, then *Ulmet* should continue to control the diminishing number of cases that may have arisen between 1962 and 1987. Because it contains no language of retroactivity, the amendment is prospective only.

There are two conflicting lines of Supreme Court cases dealing with retroactivity. The shorter and more recent line culminates in *Bradley v. Richmond School Board*, 416 U.S. 696, 711 (1974), which held that the law in effect at the time a court renders judgment applies unless it would result in manifest injustice or there is statutory direction or legislative history to the contrary. The longer,

historical line of cases, of which *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988), is the current standard-bearer, says that absent specific direction to the contrary, a new statute applies prospectively only. *See Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. ——, ——, 110 S. Ct. 1570, 1579 (1990) (Scalia, J., concurring). In *Sargisson v. United States*, 913 F.2d 918, —— (Fed. Cir. 1990), we cast our lot with the *Bowen* camp, which has the benefit of fairness and common sense.

One legislator said of the 1987 amendment that it "restores" (that is to say, puts back what was left out) the pre-1962 coverage of section 1163(d). 133 Cong. Rec. S18344 (daily ed. Dec. 17, 1988) (remarks of Sen. Glenn). But the fact remains that until 1987 the plain meaning as this court concluded in *Ulmet* was that active duty for training counted in qualifying for sanctuary. It was not apparent that Congress had a different rule in mind until 1987. Even then, if it wanted to make the amendment retroactive, it could have included words suitable to that purpose. Accordingly, the 1987 amendment does not justify overruling *Ulmet*. The court's contrary action is tantamount to retroactive application of the statute as amended in 1987 to facts arising in 1983 in the absence of congressional direction.

The same arguments that the court adopts today were made and rejected in *Ulmet*. Perhaps today's decision is the better policy. But the trouble is, through intention or inattention, it is not what Congress wrote. It is not our office to legislate the "better" policy. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 194 (1977). Our duty is to apply what Congress enacted, not what we think it should have enacted. And this is doubly true when we are overruling an earlier decision for no better reason than that a group of judges is persuaded by arguments that did not earlier prevail before another group of judges.

Federal Rule of Appellate Procedure 35(a) says that there are two prime reasons for taking a case en banc: "(1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance." This case satisfies neither of them. There is, of course, no conflict between *Ulmet* and any other case in this court (or the Supreme Court, *see* Fed. Cir. R. 35(a)). Nor is this a "question of exceptional importance." As far as we can tell, it has affected only a handful of officers in 25 years and, until *Ulmet*, never even reached a court of appeals.

But the undoing of *Ulmet* is a matter of exceptional importance. It is a pernicious practice which the rule of *stare decisis* is meant to avoid, and ensures that little in this court will ever be settled. It thwarts those who might otherwise order their affairs on the basis of our putatively definitive judgments, especially on subjects for which we are the only appellate court short of the Supreme Court. It holds out to litigants the likelihood that the court may change its mind on any matter, large or small, seemingly on whim, and will incite appeals in the face of supposedly settled precedents without any special justification, a practice we already bemoan.

A final, unrelated, infirmity in this case is the composition of the court in contravention of 28 U.S.C. § 46(c). Our internal procedures require circulation of draft dispositions to the entire court, during which time a panel is free to modify, augment, withdraw or, indeed, reverse its tentative judgment and opinion. Accordingly, until disposition of a case is announced to the public, it is not "decided."

The panel in this case circulated a draft which accommodated *Ulmet*. When the case was taken en banc sua sponte by the court after at least one member of the panel belatedly changed his mind, the panel's draft disposition became null and this entirely new disposition of

the case ensued. There having been no "decision" of the court issued by the panel that originally heard it, the case is now proceeding as though on *hearing* en banc not *re*hearing en banc. Section 46(c) does not contemplate senior judges sitting on hearings en banc. In my view, the judgment is therefore invalid. *Cf. United States v. American-Foreign Steamship Corp.*, 363 U.S. 685, 691 (1960) (vacating judgment reached by illegally composed en banc court of appeals under earlier version of section 46(c)).

I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

89-1714, -1715, -1716, -1717, -1718

JAMES A. GREEN,
STEPHEN J. WEISSENBERGER,
HOWARD A. HARVEY, JERALD D. NELSON
and DAVID V. OLSON,
Plaintiffs-Appellants,

v.

THE UNITED STATES,
Defendant-Appellee.

Decided: January 24, 1991

Before MARKEY, *Circuit Judge,** BENNETT, *Senior Circuit Judge,* and PLAGER, *Circuit Judge.*

PLAGER, *Circuit Judge.*

DECISION

Plaintiffs James A. Green, Stephen J. Weissenberger, Howard A. Harvey, Jerald D. Neslon and David V. Olson each appeal respective decisions of the Claims Court, *Green v. United States,* No. 763-87C (Aug. 10, 1989), *Weissenberger v. United States,* No. 764-87C (Aug. 11, 1989), *Harvey v. United States,* No. 788-87C (Aug. 11, 1989), *Nelson v. United States,* No. 556-88C (Aug. 14, 1989), and *Olson v. United States,* No. 673-88C (Aug. 16, 1989). The Claims Court granted summary judgment

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* Circuit Judge Markey vacated the position of Chief Judge on 27 June 1990.

in favor of the Government in each case, thereby denying plaintiffs entitlement to sanctuary under 10 U.S.C. § 1163(d) (1982).

This court, in an earlier non-precedential opinion dated October 26, 1990, affirmed the Claims Court judgments. Plaintiffs subsequently filed first a petition for rehearing, which was denied, and now a request to recall the mandate issued pursuant to that earlier opinion. Upon further consideration, we grant the request to recall the mandate, we vacate the earlier judgment and withdraw the accompanying opinion.

The decision of the Claims Court is again *affirmed*, as explained below.

OPINION

LTC Green, in 1978, after accruing over 14 years of active service time, was discharged from the Regular Army and was commissioned in the Army Reserve. Thereafter, he participated in several active duty for training (ADT) and special active duty training (SADT) tours, bringing his total creditable service time to over 18 years. On August 21, 1987, while on an ADT tour at East Point, Georgia, LTC Green requested sanctuary under § 1163(d). However, the Secretary of the Army, through his delegate, approved LTC Green's involuntary release effective November 30, 1987.

At the time Chief Warrant Officer (CWO) Weissenberger became a member of the Army Reserve in 1984, he had already accrued over 18 years of active service time in the Regular Army. While a member of the Reserve, he participated in several annual training (AT) tours. On November 3, 1987, while on AT duty, CWO Weissenberger requested sanctuary under § 1163(d). However, the Secretary of the Army's delegate approved CWA Weissenberger's involuntary release.

LTC Nelson, during a 5-day ADT tour at Travis Air Force Base, California, in December, 1987, accrued 18

years of creditable service time. During a subsequent 3-day ADT tour, also at Travis Air Force Base, LTC Nelson requested sanctuary under § 1163(d). However, the Acting Secretary of the Air Force approved LTC Nelson's involuntary release.

Major Olson, during a 140-day ADT tour at Fort Sheridan, Illinois which ended in September, 1987, accrued 18 years of creditable service time. During that tour, Major Olson requested sanctuary under § 1163(d). Nevertheless, the Assistant Secretary of the Army (Manpower and Reserve Affairs), acting as the Secretary's delegate, approved Major Olson's involuntary release as of December 22, 1987.

LTC Harvey was involuntarily released from active duty in the Regular Army on June 27, 1980. Upon his release, LTC Harvey became a member of the Army Reserve. On or about November 26, 1983, by his participation in several ADT tours, LTC Harvey accrued 18 years of creditable service time. On November 10, 1987, while on inactive status, LTC Harvey requested § 1163 (d) sanctuary. His request was denied.

Each of these service members, except LTC Harvey, requested § 1163(d) sanctuary while on ADT or AT tours, and had those requests properly denied by his service's Secretary. LTC Harvey requested § 1163(d) sanctuary while on inactive status. The Claims Court concluded that none of these service members were entitled to sanctuary under § 1163(d). In reaching these conclusions, the Claims Court properly applied the correct law.

APPENDIX C

IN THE UNITED STATES CLAIMS COURT

No. 484-87C

(Filed: May 22, 1989)

LIEUTENANT COLONEL ALBERTIS WILSON

v.

THE UNITED STATES

Military pay; 10 U.S.C. § 1163(d) sanctuary; retroactive legislation; involuntary action

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John W. Toothman, Alexandria, Virginia, attorney of record, for plaintiff. *John D. Grad* and *Grad, Toothman, Logan & Chabot, P.C.*, of counsel.

John S. Groat, Washington, D.C., with whom was *Assistant Attorney General John R. Bolton. Jonathan S. Baker*, Department of Justice, and *LTC William C. Kirk* and *MAJ Robert C. McFetridge*, Department of the Army, of counsel.

OPINION

MEROW, *Judge*:

This military pay case comes before the court on motions for summary judgment filed by the parties, together with stipulated facts as to quantum.[1] At issue is

[1] A prior unpublished interlocutory order filed October 14, 1988 concerning liability is, with limited modifications, incorporated in this opinion.

whether plaintiff was denied a right to remain on active duty under 10 U.S.C. § 1163(d).

Facts

Plaintiff enlisted in the United States Army in 1963. He subsequently was commissioned as an officer in the United States Army Reserve and in the Regular Army and was discharged as a captain on February 1, 1980, having, at that time, some 16 years of active duty service. Plaintiff then became a member of the Army Reserve and, as a lieutenant colonel (LTC), received orders to report by October 3, 1983 to Fort McPherson, Georgia, for a special active duty training tour of 179 days, to and including March 28, 1984. Plaintiff completed 18 years of active duty service during this training tour. Retirement was possible with 20 years of service. 10 U.S.C. § 3911 (1982). On February 6, 1984 plaintiff wrote to Army headquarters in Washington, D.C. requesting that he be retained on active duty under the "sancutary" provisions of 10 U.S.C. § 1163(d), which then stated as follows:

> [A] member of a reserve component who is on active duty and is within two years of becoming eligible for retired or retainer pay under a purely military retirement system, may not be involuntarily released from that duty before he becomes eligible for that pay, unless his release is approved by the Secretary.

No response to plaintiff's letter of February 6, 1984 has been submitted. Plaintiff was not retained on active duty after his tour ended on March 28, 1984.

On August 10, 1984 plaintiff requested that he be recalled to active duty to complete 20 years of service for retirement purposes. This request was "disapproved" by a written response dated October 5 1984.

By a letter dated January 5, 1985, counsel for plaintiff wrote the Secretary of the Army to request that the

situation be reviewed and that recall orders be issued so plaintiff "may be permitted to complete his 20 years of active duty and retire." The Army responded by a letter dated February 22, 1985 from William D. Clark, Principal Deputy Assistant Secretary (Manpower and Reserve Affairs), which stated (in relevant part):

> Section 1163(d), 10 United States Code, does not give Reserve members who complete 18 years active federal service (AFS) while on Active Duty for Training (ADT) or Special Active Duty for Training (SADT) the right to be continued on active duty solely for the purpose of completing 20 years of service for retirement purposes. Officers on ADT/SADT should understand that future service in an ADT/SADT status is based upon valid requirements as determined by the Department of the Army rather than upon the amount of AFS accumulated by the officer.
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> While Major Wilson is not automatically entitled by law to further active duty, he is neither precluded from such service. However, future service depends upon the existence of a valid requirement and Major Wilson's selection as the best qualified officer available. The Department of the Army retains the right to make such determinations.

On August 13, 1987 plaintiff filed his complaint in this court seeking back pay, allowances and benefits from March 27, 1984, reinstatement to active duty, and other relief.

On December 30, 1987, 10 U.S.C. § 1163(d) was amended by Pub. L. No. 100-224 to read:

> Under regulations to be prescribed by the Secretary concerned, which shall be as uniform as practicable, a member of a reserve component who is on active duty (*other than for training*) and is within two years of becoming eligible for retired or retainer pay

> under a purely military system, may not be involuntarily released from that duty before he becomes eligible for that pay, unless his release is approved by the Secretary.

(Emphasis added.)

Discussion

Plaintiff has moved for summary judgment based upon the decision in *Ulmet v. United States*, 822 F.2d 1079 (Fed. Cir. 1987). Relying on the plain language of 10 U.S.C. § 1163(d) prior to its amendment in 1987, the Federal Circuit held in *Ulmet* that the time served by LTC Ulmet on active duty for training was to be included in computing the time required for sanctuary under § 1163(d).

Defendant's motion for summary judgment relies on the December 30, 1987 amendment to 10 U.S.C. § 1163(d) which removed any officer on a tour of active duty for training from eligibility for 18-year "sanctuary." Defendant also argues that, by reason of the above-quoted February 22, 1985 letter from Deputy Assistant Secretary Clark, plaintiff's March 28, 1984 release from active duty became "approved by the Secretary" so as to come within the exception to "sanctuary" as provided in 10 U.S.C. § 1163(d) both before and after the 1987 amendment. Supplemental briefs requested by the court have also been filed in this matter concerning the word "involuntarily" as used in 10 U.S.C. § 1163(d). Defendant argues that service by the member for an active duty for training tour is mutually consensual such that release from active duty at the end of the training tour cannot be "involuntary" as required in 10 U.S.C. § 1163(d) for sanctuary.

Plaintiff argues that any application of the 1987 amendment of 10 U.S.C. § 1163(d) to render plaintiff ineligible for sanctuary during his special active duty for training would offend constitutional due process princi-

ples. Plaintiff also argues that the "involuntary" release from duty issue was decided in *Ulmet v. United States*, 822 F.2d 1079 (Fed. Cir. 1987), so that it is not open for consideration in this case. Plaintiff argues that the release from active duty at the end of a fixed training tour is "involuntary," as that term is used in 10 U.S.C. § 1163(d).

With respect to plaintiff's argument that application of the 1987 amendment of 10 U.S.C. § 1163(d) to plaintiff's prior tour of duty would offend constitutional due process principles, it is concluded that, to the contrary, Congress could validly so act. The statutory right to military pay is within the control of Congress and is always subject to change. *See United States v. Larionoff*, 431 U.S. 864, 869, 879 (1977); *Alberico v. United States*, 783 F.2d 1024 (Fed. Cir. 1986); *Norman v. United States*, 183 Ct. Cl. 41, 392 F.2d 255 (1968), *cert. denied*, 393 U.S. 1018 (1969). Only the President and Article III judges have constitutional protection with respect to congressional reduction of their compensation. U.S. Const. art. II, § 1, cl. 7, art. III, § 1; *United States v. Will*, 449 U.S. 200 (1980).

Accordingly, it is concluded that Congress could, in 1987, enact valid legislation which would restrict the eligibility of officers for 10 U.S.C. § 1163(d) sanctuary to those who reached 18 years of active duty service on a tour of duty, before or after 1987, which was other than for training. The question raised by defendant's motion and plaintiff's opposition is whether the 1987 amendment to 10 U.S.C. § 1163(d) was intended by Congress to apply to prior tours of duty.

The 1987 amendment at issue did not overrule the decision in *Ulmet v. United States*, 822 F.2d 1079 (Fed. Cir. 1987). The amendment does not serve to eliminate active duty for training time as counting toward the 18 years required for 10 U.S.C. § 1163(d) sanctuary or the 20 years required for retired pay under 10 U.S.C.

§ 3911. The amendment merely states that an officer on a "training" tour of duty does not become eligible for sanctuary. Presumably, if an officer obtained 18 years of active duty service, training or otherwise, and was then called to active duty other than for training, sanctuary would be available. In the present case, as plaintiff reached his 18-year mark while on a 1984 training tour of duty, it must be decided whether the 1987 amendment renders him ineligible.

Defendant argues the general principle that new law must be applied in pending cases. *Bradley v. Richmond School Board*, 416 U.S. 696 (1974). However, this does not resolve the problem because the basic question is whether Congress, in the 1987 legislation, added the words "other than for training" to apply to past tours of duty. As noted in *United States v. Larionoff*, 431 U.S. 864, 879 (1977), it is the congressional intent which is controlling.

Defendant cites floor statements by two legislators, Representative Beverly B. Byron and Senator John Glenn, as supporting application of the 1987 amendment to the 1984 tour of duty involved in this case. Representative Byron's statement speaks of preventing "a windfall never intended by law for a small group of reservists who may come on active duty for training and then, as a result of a recent court decision, may remain in an active status until they qualify for retirement benefits; * * *." 133 Cong. Rec. H11509-10 (daily ed. Dec. 16, 1987). Senator Glenn's remarks noted that a loophole in 10 U.S.C. § 1163(d) had been found by one court to allow certain reservists on training duty to claim retirement sanctuary and stated that, with respect to the amendment, "the correction restores the original intent of the section and is appropriate." 133 Cong. Rec. S18344 (daily ed. Dec. 17, 1987).

These floor remarks are essentially neutral as to the application of the 1987 language to prior tours of duty.

The legislation, itself, is silent on the matter. Other recent legislation overruling a court decision has expressly dealt with its application to prior time periods. For example, when Congress disagreed with the ruling in *McCarty v. McCarty*, 453 U.S. 210 (1981), concerning military retirement pay, the legislation overruling this holding, Pub. L. No. 97-252, §§ 1001-1006, 96 Stat. 730 (1982), 10 U.S.C. § 2408 (c)(1), contained a clear expression, by stated date, as to its applicability to prior pay periods. *See Fern v. United States*, 15 Cl. Ct. 580 (1988), *appeal filed* (Fed. Cir. No. 89-1106). It is not the court's function to add or subtract to the legislation as written. *Ricker v. United States*, 184 Ct. Cl. 402, 396 F.2d 454 (1968).

It is concluded that, if Congress had intended that the 1987 language be applied to render officers on training tours of duty prior to its enactment ineligible for sanctuary, this would have been expressly spelled out in the legislation. *Bowen v. Georgetown University Hospital*, —— U.S. ——, 109 S.Ct. 468, 471-75 (1988) ("Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."). At the time plaintiff completed his 18-year active duty service requirement, the language of 10 U.S.C. § 1163(d), as interpreted in *Ulmet v. United States*, 822 F.2d 1079 (Fed. Cir. 1987), provided for retirement sanctuary.[2] No training duty exception was then expressly present. Just as plaintiff's active duty pay for 1984 must be based on the pay rate then set by legislation, so must his eligibility for sanc-

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[2] While defendant urges that the 1987 legislation also constitutes an interpretation of the language in effect in 1984, the Federal Circuit's decision in *Ulmet* still remains controlling precedent on this issue for the Claims Court. Moreover, the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one. *United States v. Price*, 361 U.S. 304, 313 (1960); *Jefferson County Pharm. Assn. v. Abbott Labs.*, 460 U.S. 150, 165 n.27 (1983).

tuary be determined by 10 U.S.C. § 1163(d) as then in effect.

Next, the question whether plaintiff was "involuntarily released" on March 28, 1984 from his training tour must be resolved.

For purposes of civil service retirement, a separation resulting from expiration of a period for which a temporary or fixed-term appointment was made is normally considered to be involuntary. *See Sullivan v. United States*, 4 Cl. Ct. 70 (1983), *aff'd*, 742 F.2d 628 (1984). If this principle can also be applied to a military training tour, release from active duty at the scheduled expiration of the tour would normally be "involuntary."

However, 10 U.S.C. § 1163(d) somewhat differs from the civil service retirement situation in that, if applicable, the sanctuary provision requires two additional years of active duty. For a reserve member on a limited training tour who has a civilian career, remaining on active duty for an additional two-year tour of military active duty may not be a feasible undertaking. It is understandable that Congress has provided that only "involuntary" release is prohibited after the 18 years of service is achieved. As voluntary releases after 18 years of service are clearly contemplated since the statute prohibits only an involuntary release, the issue of whether a particular release was voluntary or involuntary must be resolved based on the individual circumstances presented. *See Sullivan v. United States, supra*; *Awtry v. United States*, 161 Ct. Cl. 681, 685, *cert. denied*, 379 U.S. 929 (1964). This is also consistent with the principle that persons who must serve to be entitled to pay must show they were ready, willing and able to serve in order to recover back pay for the period involved. *United States v. Wichersham*, 201 U.S. 390, 399-400 (1906); *Corrigan v. United States*, 153 Ct. Cl. 392, 398 (1961). If a member serving a limited active duty tour for training was not ready, willing and able to continue on active duty

for an additional two years, no claim for back pay could arise for lost sanctuary under 10 U.S.C. § 1163(d). Rather, the release from the limited active duty training tour under this circumstance would be voluntary, as the continued active duty service for two more years, which would generate the pay entitlement, was not contemplated or sought.

The record in the instant matter shows that plaintiff was ready, willing and able to serve an additional two years and so informed the Army by his letter of February 6, 1984 prior to his release on March 28, 1984. Thus, this case is controlled by *Ulmet v. United States*, 822 F.2d 1079 (Fed. Cir. 1987), as in that case the plaintiff also sought sanctuary prior to his release from active duty and the court ruled in favor of plaintiff's sanctuary entitlement.

In the circumstance where a member on active duty for training with 18 years of service affirmatively seeks sanctuary under 10 U.S.C. § 1163(d), an ensuing release from active duty prior to 18 years of service is "involuntary." Such an "involuntary" release would be valid only if "approved by the Secretary." 10 U.S.C. § 1163(d).

Accordingly, it must be resolved whether plaintiff's 1984 release was "approved by the Secretary" such as to come within the exception to the 10 U.S.C. § 1163(d) requirement for retention on active duty. The text of the previously-quoted letter from William D. Clark, Principal Deputy Assistant Secretary, is sufficient to refute the present assertion that plaintiff's 1984 release from active duty was, or become, so approved. The matter at issue was plaintiff's request for recall, not retention on active duty. Plaintiff left active duty when his training tour ended, without secretarial action. Moreover, the Secretary could not have addressed the question at issue because he was operating on the erroneous premise, given the subsequent ruling in *Ulmet*, that plaintiff had no entitlement to retention on active duty. Thus, the Secre-

tary, or his delegate, did not consider or render any decision that, despite plaintiff's entitlement to sanctuary, his release was, nevertheless, approved.

Conclusion

As plaintiff qualified for sanctuary under 10 U.S.C. § 1163(d) but did not obtain it, he is entitled to recover the equivalent monetary compensation together with an appropriate correction of records pursuant to 28 U.S.C. § 1491(a)(2).

The parties have stipulated that back pay for the sanctuary period less civilian pay offsets (*Motto v. United States*, 175 Ct. Cl. 862, 360 F.2d 643 (1966)), equals $24,906.55 and retired pay computed from March 1, 1986 through June 30, 1989, less appropriate adjustments, equals $46,367.96. The total monetary recovery is $71,274.51. It is agreed that 20 percent will be withheld for federal income tax.

Accordingly, it is ORDERED:

(1) final judgment shall be entered in favor of plaintiff in the amount of $71,274.51 with 20 percent of the judgment amount to be withheld for federal income tax, with no costs assessed;

(2) all appropriate records shall promptly be corrected to reflect the service and pay entitlement here adjudicated.

APPENDIX D

IN THE UNITED STATES CLAIMS COURT

No. 763-87C

(Filed August 10, 1989)

LIEUTENANT COLONEL JAMES A. GREEN

v.

THE UNITED STATES

Military pay; Reserve officer; involuntary release; sanctuary

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John W. Toothman, Alexandria, Virginia, attorney of record, for plaintiff. *John D. Grad* and *Grad, Toothman, Logan & Chabot, P.C.*, of counsel.

John S. Groat, Washington, D. C., with whom was *Assistant Attorney General John R. Bolton*, for defendant. *Lt. Col. William C. Kirk* and *Major Robert C. McFetridge*, Department of the Army, of counsel.

OPINION

MEROW, *Judge.*

This military pay case is presented on cross dispositive motions. Plaintiff, a lieutenant colonel (LTC) in the United States Army Reserve, seeks active duty pay and retirement pay stemming from the Army's alleged failure to comply with 10 U.S.C. § 1163(d), as construed in *Ulmet v. United States*, 822 F.2d 1079 (Fed. Cir. 1987).

Facts

Upon graduation from West Point in 1963, plaintiff was commissioned in the Regular Army and served until his honorable discharge in 1978. He was then commissioned in the Army Reserve having, at that time, over 14 years of active duty service. As a Reserve officer, with his consent, plaintiff could obtain orders for tours of active duty. The documents filed in this matter show that the initial order plaintiff obtained for a tour of active duty for training (ADT) as a Reserve officer was on February 23, 1979. The order of that date provided (in part):

> You are ordered to active duty for training ADT for the period indicated plus allowable travel time. Upon completion of the period of ADT unless sooner relieved or extended by proper authority, you will return to the place where you entered ADT and be relieved from such duty.
>
> Period: 26 days plus allowable travel time
>
> Report to: HQ, FORSCOM, DCSOPS, Docu Div., Ft. McPherson, GA
>
> Reporting date: between 0730 & 0800 hrs 5 MAR 79
>
> Attached to: HQ, FORSCOM, Ft. McPherson, GA
>
> Purpose: ADT/Staff Off (DTY W/DCSOPS-AFOP-DD)

Subsequent orders plaintiff obtained provided similar short tours of active duty with a longer tour of approximately one year of Special Active Duty Training (SADT) at Fort Gordon, Georgia ordered in September of 1982.

In July of 1985 plaintiff obtained orders for a five-month SADT tour in Washington, D. C. to develop an alternative method of reporting to Congress the budget effects on Reserve components with respect to the distribu-

tion of equipment purchased. During this tour of training duty which, under the orders received, ended on December 18, 1985, plaintiff's active duty service time passed the 18 year mark.

Subsequent to 1985, plaintiff obtained some 16 orders for ADT for periods ranging from one day to 20 days of active duty. For example, the order dated November 1, 1986 provided three days of ADT for plaintiff to "ATTEND GALLANT EAGLE FOLLOW-UP CONFERENCE" and also included the language:

> I UNDERSTAND THAT I CANNOT BE RETAINED TO COMPLETE 20 YRS OF AS [ACTIVE SERVICE] FOR RET PUR (AR 635-100) IF I COMPLETE 18 OR MORE YEARS OF ACTIVE FEDERAL SERVICE WHILE SERVING ON THIS PERIOD OF ADT.

On July 14, 1987, plaintiff obtained orders for 66 days of ADT at East Point, Georgia. On August 21, 1987 plaintiff sent the following letter, through the chain of command, to Headquarters, Department of the Army:

> SUBJECT: Retention on Active Duty
>
> 1. I am currently on a SADT tour at the 335th Signal Command, East Point, Georgia.
>
> 2. I have exceeded a total of eighteen (18) years of active federal service.
>
> 3. In accordance with 10 USC, 1163(d) and recent federal court interpretations of that law, I request retention on active duty to complete a normal service retirement.
>
> James A. Green /s/
> JAMES A. GREEN
> LTC, SC

The Secretary of the Army delegated his authority under 10 U.S.C. § 1163(d) to approve the involuntary release from active duty of Reserve component members to the Assistant Secretary of the Army (Manpower and Reserve Affairs). That official executed a decision that "[p]ursuant to 10 U.S.C. § 681 and 1163(d), the release from active duty of LTC James A. Green, 256-60-3804, is hereby approved, to be effective November 30, 1987." LTC Green went off active duty after November 30, 1987.

The instant litigation was commenced on December 21, 1987.

Discussion

The so-called sanctuary provision involved in this matter, 10 U.S.C. § 1163(d), provides that a Reserve component member on active duty who is "within two years of becoming eligible for retired pay or retainer pay under a purely military retirement system, may not be involuntarily released from that duty before he becomes eligible for that pay, unless his release is approved by the Secretary."

As plaintiff could retire with 20 years of active duty service, 10 U.S.C. § 3911, the sanctuary point under 10 U.S.C. § 1163(d) would be reached upon attaining 18 years of active duty service. Plaintiff reached this point during his Washington, D. C. tour of training duty from July-December 1985. Plaintiff claims entitlement to active duty pay from the end of this tour of duty on December 18, 1985 until 20 years of service is attained and retired pay thereafter.

Defendant seeks dismissal of plaintiff's claims on the same basis asserted in *Wilson v. United States*, 16 Cl. Ct. 765 (1989), *appeal docketed*, No. 89-1598 (CAFC July 20, 1989), the retroactive application of the Act of December 30, 1987, Pub. L. No. 100-224, 101 Stat. 1536. This Act amended 10 U.S.C. § 1163(d) by limiting it to

Reserve component members on active duty "other than for training."

For the reasons expressed in *Wilson v. United States, supra,* defendant's position on retroactive application of Pub. L. No. 100-224 is rejected and plaintiff's entitlement wil be resolved under the language of 10 U.S.C. § 1163(d) in effect during his tours of active duty.

Under 10 U.S.C. § 1163(d), after November of 1985 (18 years active duty point), plaintiff could not be *involuntarily* released from active duty except with the approval of the Secretary. Defendant asserts that prior to November of 1987 plaintiff was not involuntarily released from his tours of duty. Plaintiff asserts that as each active duty tour ended, he was automatically involuntarily released in violation of 10 U.S.C. § 1163(d).

It is concluded that after November 1985 and prior to November 30, 1987, plaintiff was not involuntarily released from an active duty tour. In each instance, the orders plaintiff received specified the duration of the active duty tour. If the tour was to be extended, it was necessary for the orders to be amended to provide a basis for continued pay entitlement. *See Reade v. United States,* 14 Cl. Ct. 531 (1988). Several of plaintiff's tours were extended by amended orders. Plaintiff was in a position to request continued active duty and, under 10 U.S.C. § 1163(d), the Army was obliged to provide it, absent action by the Secretary. The absence of a written request for continued active duty, equivalent to the application a Reserve component member must make to obtain an active duty training tour under AR 135-200, leads to the conclusion that each release from an active duty training tour prior to November 30, 1987 was voluntary. It is only reasonable that the Army first obtain a Reserve member's request for an extension and resulting knowledge of the member's willingness and ability to continue on active duty before it can be assessed liability for continuing back pay on the basis that the expiration

of the training tour of duty ordered resulted in an "involuntary" release.

In assessing liability for an "involuntary" release of a Reserve officer in *Mansell v. United States*, 199 Ct. Cl. 769, 468 F.2d 933 (1972), the court emphasized that "involuntary" (as then used in 10 U.S.C. § 687(a) concerning readjustment payments) meant "contrary to his own choice, preference and desire" of which the Navy was aware. 199 Ct. Cl. at 801, 468 F.2d at 936. In *Mansell, supra*, the Court of Claims also ruled that the release occurring at the expiration of a tour of duty would be voluntary. 199 Ct. Cl. at 802, 468 F.2d at 936. *See also Merriott v. United States*, 163 Ct. Cl. 261, 264 (1963), *cert. denied*, 379 U.S. 838 (1964) ("There is no allegation or showing that, at or about the time of his release, plaintiff objected to being released or sought to remain in the Army.").

Thus, within the context of 10 U.S.C. § 1163(d) the term "involuntarily" contemplates prior knowledge on the part of the Army as to a Reserve member's desire to continue on active duty and the member's availability and ability to do so for the substantial additional period of time (up to two years) involved. This prior knowledge was present in *Ulmet v. United States* and *Wilson v. United States, supra.* Most Reserve members serving short active duty training tours, and also having civilian career responsibilities, would not, it is assumed, welcome an interpretation that such brief training tours must automatically be extended two years under 10 U.S.C. § 1163(d) when the 18 years service point is reached. A more reasonable interpretation, consistent with the consensual nature of active duty training tours for Reserve members, is that 10 U.S.C. § 1163(d) prohibits a release at the end of an ordered tour of duty if the Reserve member, with the requisite 18 years of active duty service, duly requests an amendment extending the tour,

unless the Secretary then approves the release contrary to the member's request.

Plaintiff did request an extension of his training tour while on active duty in 1987 such that the release from this tour, against his expressed request, would be involuntary under 10 U.S.C. § 1163(d). However, this release was approved by the Secretary's designated official. On addition to the express authority present in 10 U.S.C. § 1163(d), the Secretary has broad discretion to release a Reserve member from active duty. *Abruzzo v. United States*, 206 Ct. Cl. 731, 737, 513 F.2d 608, 611 (1975); *Burns v. United States*, 9 Cl. Ct. 273, 277 (1985). Plaintiff has not established any basis for back pay in this circumstance. *Alberico v. United States*, 783 F.2d 1024 (Fed. Cir. 1986).

Conclusion

Accordingly, as plaintiff has not been released involuntarily from any tour of duty prior to November 30, 1987 and that release was approved by the authority of the Secretary, no entitlement to sanctuary involving back pay under 10 U.S.C. § 1163(d) exists. In this circumstance, it is ORDERED that, on the motions filed, final judgment shall be entered dismissing the complaint with no costs to be assessed.

IN THE UNITED STATES CLAIMS COURT

No. 763-87C

(Filed: August 22, 1989)

LIEUTENANT COLONEL JAMES A. GREEN

v.

THE UNITED STATES

ORDER

Plaintiff moves for reconsideration, attaching additional documents concerning a tour of duty sought by or for plaintiff in 1985.

The opinion filed August 10, 1989 noted that the tour of special active duty for training (SADT), during which plaintiff passed the 18-year active duty service point, ended on December 18, 1985 (including travel time) (sl. op. p. 2).

Plaintiff now submits documents showing that the Deputy Chief of Staff for Research, Development and Acquisition proposed that LTC Green be recalled to active duty for a period of two years beginning on December 16, 1985. The proposal noted that "4. LTC James A. Green has been on Special Active Duty for Training (SADT) tour in ODCSRDA for five months which ends on 15 December 1985."

In a memorandum for the Chief of Army Reserve, Major General Lynn H. Stevens, Director of Material Plans and Programs, ODCSRDA, stated:

> 3. We are requesting (under a new program designed to support active Army requirements) that he

> [LTC Green] be ordered to temporary active duty with ODCSRDA on 16 December 1985. I have attached a copy of our request to inform you of our actions, explain our unexpected requirement, and avoid confusion with past actions bringing and extending him on tour for a project supporting USAR interests.

In connection with this proposed new tour of duty, LTC Green executed a DA Form 160, "Application for Active Duty," volunteering to enter on active duty for a period of two years and listing his preference to enter on active duty as: Preference No. 1, "December 85"; Preference No. 2, "January 86"; Preference No. 3, "February 86."

Plaintiff urges reconsideration of the opinion of August 10, 1989 on the basis that the additional documents show a request by LTC Green to remain on duty during his 1985 SADT service such that he was "involuntarily released" on December 18, 1985 in violation of 10 U.S.C. § 1163(d).

It is concluded that no basis for reconsideration has been shown. The additional documents clearly show that a new and different tour of active duty was then contemplated for LTC Green to commence after his release from his SADT. The above-quoted memorandum to the Chief of Army Reserve makes this clear. In fact, the additional documents support the prior determination that the December 18, 1985 release from SADT was voluntary. LTC Green did not in 1985 claim any retention right under 10 U.S.C. § 1163(d) to remain on active duty under his SADT orders. Rather, in 1985 he expressly volunteered for a proposed new tour of active duty which would commence only *after* his release from his SADT orders. This is only consistent with a voluntary release from SADT so as to be in a position to enter on active duty under the proposed new orders requested by ODCSRDA. An extension of the existing SADT or-

ders or assertion of a right to continued active duty was not requested or proposed.

As no valid basis for reconsideration has been shown, it is ORDERED that the motion filed August 19, 1989 is denied.

/s/ James F. Merow
JAMES F. MEROW
Judge

APPENDIX E

IN THE UNITED STATES CLAIMS COURT

No. 764-87C

(Filed: August 11, 1989)

CHIEF WARRANT OFFICER
STEPHEN J. WEISSENBERGER

v.

THE UNITED STATES

ORDER

This military pay matter comes before the court on the basis of cross dispositive motions.

In 1984 Chief Warrant Officer (CWO) Stephen J. Weissenberger became a member of the Army Reserve with over 18 years of active duty service. On June 21, 1986, CWO Weissenberger obtained orders providing (in part):

> YOU ARE ORDERED TO ANNUAL TRAINING (AT) FOR THE PERIOD SHOWN. UPON COMPLETION OF THE PERIOD OF AT, UNLESS SOONER RELEASED OR EXTENDED BY PROPER AUTHORITY, YOU WILL RETURN TO THE PLACE WHERE YOU ENTERED AT AND BE RELEASED FROM SUCH DUTY. PERIOD: 12 DAYS PLUS ALLOWABLE TRAVEL TIME.

Similar orders for annual training (AT) were issued on December 29, 1986 (13 days plus allowable travel time) and October 22, 1987 (12 days plus allowable travel time).

While on AT duty, on November 3, 1987 plaintiff sent the following:

> FOR: Commander, ARPERCEN, St. Louis, MO, 63132-5200
>
> SUBJECT: Request to Remain on Active Duty
>
> 1. Request that pursuant to Title 10 U.S.C. Section 1193(d) I be allowed to remain on active duty.
>
> 2. I am currently on active duty with the aviation section, United States Army Corps of Engineers, European Division at Wiesbaden Air Base, West Germany and have accumulated at least eighteen years, eight months, and five days of active duty time as of the date of this request.
>
> Stephen J. Weissenberger /s/
> STEPHEN J. WEISSENBERGER
> CW4, USAR

Plaintiff's request to remain on active duty was not granted. Instead, his release from active duty was approved by the Assistant Secretary delegated this authority by the Secretary of the Army (*see* Plaintiff's Reply filed June 13, 1988, p. 6, n.7; Complaint, par. 7).

This case presents the same issues decided in *Green v. United States*, —— Cl. Ct. —— (No. 763-87C, Sl. Op. Aug. 10, 1989).

Accordingly, for the reasons expressed in *Green v. United States, supra*, as plaintiff was not involuntarily released from an active duty tour prior to November of 1987, and that release was approved by the authority of the Secretary of the Army, no entitlement to active duty or retired pay exists under 10 U.S.C. § 1163(d).

Accordingly, it is ORDERED that final judgment be entered dismissing the complaint with no costs to be assessed.

/s/ James F. Merow
JAMES F. MEROW
Judge

APPENDIX F

IN THE UNITED STATES CLAIMS COURT

No. 788-87C

(Filed: August 11, 1989)

LIEUTENANT COLONEL HOWARD A. HARVEY

v.

THE UNITED STATES

ORDER

This matter comes before the court on cross dispositive motions and supplemental briefing requested by the court.

The facts set forth in this matter show that, as a Reserve officer with over 18 years of service, plaintiff obtained short tour active duty assignments up to January 27, 1984, but not thereafter.

On April 14, 1985, plaintiff sent a letter inquiring as to the Army's policy with respect to short-tour assignments as follows (in part):

> Office of Deputy Chief of Staff Personnel
> Washington, D.C. 23310
>
> ATTN: LTG Elton
>
> Dear General Elton:
>
> I request your assistance in clarifying DOD's position on permitting an inactive reserve officer with

over 18 years active duty to come on active duty for either long or short term assignments.

I completed 18 years active duty two tours ago and had visions of completing 20 years of active duty before I reached my reserve mandatory retirement date. OCAR's response of immediately shortening my tour last November gives me reason to believe that I may never be given another active duty assignment even though I have performed in an exceptional and exemplary manner.

Although I do not read the regulations as being prohibitive in allowing an officer with over 18 years to qualify for short-term assignments, I keep hearing phrases such as "exception to policy" and "the only officer in the entire reserves who is qualified to do the work" to name only two.

To assist my travel through the administrative maze, I do need several questions answered:

It is DOD policy to prohibit inactive reserve personnel with over 18 years active duty from completing 20 years active duty?

Is there a written or unwritten rule that before a reserve officer with over 18 years active duty can be given any short tour active duty assignment, he must be proven to be the only officer in the United States who can perform the job?

What must I do to obtain future short tour assignments?

Do I have any lock-in protection for having gone over 18 years active duty? My readjustment pay has been reimbursed to the government. If I don't have any lock-in protection, why is there resistance to permitting me to go on active duty?

• • • •

On November 10, 1987 plaintiff sent the following sanctuary request:

> TO: Department of the Army, Deputy Chief of Staff Personnel,
> ATTN: DAPE, Washington DC 20310-0300
>
> 1. Reference Sancutary Provision ULMET VS United States 822 F.2d 1079 (FED CIR 1987).
>
> 2. Request lock in for twenty years active duty based on the above reference. I have completed beyond 18 years of active duty (see attached DD Form 214 and Statement of retirement points).
>
> 3. My present address is: LTC Howard A. Harvey, 124 Massachusetts St. Westfield N.J. 07090. SSN 312410980
>
> Howard A. Harvey /s/
> Howard A. Harvey
> LTC USAR

Plaintiff claims that his release from a short tour of active duty on January 27, 1984 violated 10 U.S.C. § 1163(d), such that he is owed active duty pay to complete 20 years of such service and retired pay thereafter. As such, the issues raised are the same as those resolved in *Green v. United States*, —— Cl. Ct. —— (No. 763-87C, Sl. Op. Aug. 10, 1989). For the reasons there expressed, plaintiff has not been involuntarily released from a tour of active duty. LTC Harvey was not on active duty when he submitted his 1987 sancutary request.

Thus, for the reasons expressed in *Green v. United States, supra*, it is ORDERED that final judgment be entered dismissing the instant complaint, with no costs to be assessed.

/s/ James F. Merow
JAMES F. MEROW
Judge

APPENDIX G

IN THE UNITED STATES CLAIMS COURT

No. 556-88C

(Filed: August 14, 1989)

LTC JERALD D. NELSON

v.

THE UNITED STATES

ORDER

Plaintiff, a lieutenant colonel (LTC) in the United States Air Force Reserve, seeks active duty pay from December 18, 1987 until he obtains 20 years of service, and retired pay thereafter. The claim is premised upon an alleged violation of 10 U.S.C. § 1163(d), as construed in *Ulmet v. United States*, 822 F.2d 1079 (Fed. Cir. 1987).

On December 14, 1987, LTC Nelson obtained orders for a 5-day active duty training tour at Travis Air Force Base, California. During this tour, plaintiff reached 18 years of active duty service. Plaintiff claims his release from active duty at the expiration of this tour was in violation of 10 U.S.C. § 1163(d). However, for the reasons discussed in *Green v. United States*, —— Cl. Ct. —— (No. 763-87C, Sl. Op. Aug. 10, 1989), plaintiff was not then "involuntarily released" such as to result in a violation of 10 U.S.C. § 1163(d) producing entitlement to back pay.

During a subsequent 3-day active duty tour, December 21-23, 1987, at Travis Air Force Base, plaintiff submitted a request that he be retained on active duty, as follows:

22 DEC 1987

SUBJECT: Request to be Retained on Active Duty and Active Duty Credit for Retirement for Lt Col Jerald D. Nelson, 481-46-9977FV

TO: 349 MAW/CC
4 AF/CC
HQ AFRES/CV
HQ USAF/RE
SECAF
IN TURN

1. This letter constitutes a formal request that I be retained on or reinstated to continuous active duty in the United States Air Force or Air Force Reserve until I complete 20 years active duty service and qualify for active duty retirement. This request is based upon the provisions of Title 10 of the United States Code, Sections 1163(d) and 3911, and the 30 June 1987 decision of the Court of Appeals for the Federal Circuit (case no. 86-1693), Lt Col Oliver Donovan Ulmet vs. United States.

2. I have 12 years 11 months 24 days extended active duty service and, in addition, have performed 5 years 7 days of active duty in the Air Force Reserve. As of 21 December 1987, I have completed an aggregate total of 18 years 1 day of federal active military service. This time may be verified through various documents including DD Form 214, ANG/USAFR Point Credit Summary, pay documents and records, and AFRES published orders, copies of which are in my possession. I am presently serving a three day tour of active duty performing

in-garrison commander duties (HQ 349 ABG order no. ROD—5648, 3 DEC 87).

3. I have served the Air Force and Air Force Reserve for over 25 years as a commissioned officer. In so doing, I have met all provisions of the law required for sancutary and strongly feel that I have earned and deserve retention on or reinstatement to active duty that will result in qualification for a twenty year retirement.

Jerald D. Nelson /s/
JERALD D. NELSON, Lt Col, USAFR
Commander

Plaintiff's request was not granted. Instead, his release from the 3-day tour of duty on December 23, 1987 was approved by the Acting Secretary of the Air Force, as follows:

7 Jul 1988

MEMORANDUM FOR CHIEF OF AIR FORCE RESERVE

SUBJECT: Release From Active Duty Training, Lt Col Jerold [sic] D. Nelson

Upon recommendation of the Chief of Staff, and pursuant to section 1163(d) of title 10, United States Code, the release from active duty for training of Lt Col Jerold [sic] D. Nelson, 481-46-9977FV, which took place on December 23, 1987, is approved. Lt Col Nelson's request for retention or reinstatement on active duty is denied.

James F. McGovern /s/
James F. McGovern
Acting Secretary of the Air Force

Accordingly, as plaintiff has not set forth a situation where he was involuntarily released from an active duty

tour in the absence of an approval by the Secretary, no violation of 10 U.S.C. § 1163(d) has been established.

For the reasons set forth in *Green v. United States*, *supra*, it is ORDERED that final judgment be entered dismissing the complaint with no costs to be assessed.

/s/ James F. Merow
JAMES F. MEROW
Judge

IN THE UNITED STATES CLAIMS COURT

No. 556-88C

(Filed: August 22, 1989)

LTC JERALD D. NELSON

v.

THE UNITED STATES

ORDER

Plaintiff seeks reconsideration of the opinion filed August 10, 1989. For the reasons expressed in the order filed August 16, 1989 in *Olson v. United States*, No. 673-88C, p. 5, n.1, it is concluded that plaintiff has not set forth any valid basis for reconsideration.

Accordingly, it is ORDERED that the motion filed August 18, 1989 is denied.

/s/ James F. Merow
JAMES F. MEROW
Judge

APPENDIX H

IN THE UNITED STATES CLAIMS COURT

No. 673-88C

(Filed: August 16, 1989)

MAJOR DAVID V. OLSON

v.

THE UNITED STATES

ORDER

This military pay matter comes before the court on dispositive motions.

Major David V. Olson, (MAJ), an Army Reserve officer with over 18 years of active duty service, seeks active duty pay and retired pay based upon alleged violations of 10 U.S.C. § 1163(d), as construed in *Ulmet v. United States*, 822 F.2d 1079 (Fed. Cir. 1987).

For the purpose of developing a CAPSTONE Mission Guidance monitoring system for Fourth U.S. Army and its subordinate units, plaintiff obtained orders dated May 12, 1987, which provided (in part):

> YOU ARE ORDERED TO ACTIVE DUTY TRAINING [ADT] FOR THE PERIOD INDICATED. UPON COMPLETION OF THE PERIOD OF ADT, UNLESS SOONER RELIEVED OR EXTENDED BY PROPER AUTHORITY, YOU WILL RETURN TO THE PLACE WHERE YOU ENTERED ADT AND BE RELIEVED FROM SUCH DUTY.

PERIOD: 140 DAYS PLUS ALLOWABLE TRAVEL TIME
REPORT TO: FT. SHERIDAN, IL 60037
REPORTING TIME/DATE: * * * 0800 HOURS, 87/05/14
ATTACHED TO: HQ 4TH ARMY, DCSOPS, FT. SHERIDAN, IL
PURPOSE: CAPSTONE REALIGNMENT OFFICER

During this 5-month tour of duty, on August 14, 1987 plaintiff submitted a request to remain on active duty as follows (in part):

FOR: Assistant Secretary of the Army for Manpower and Reserve Affairs, Washington, DC 20310

SUBJECT: Request for Retention on Active Duty

REFERENCE: Section 1163 of Title 10, U.S. Code
Section 672(d) of Title 10, U.S. Code
AR 135-210
AR 135-18
AR 135-40

1. Request I be retained on Full-Time-Active duty under the provisions of the 18-year Sanctuary Rule so that I may be allowed to complete 20 years of Active Federal Service. On 30 September 1987, I will have completed 6,687 days of Active Federal Service.

2. Attached as enclosure 1 is DARP Form 249, dated 13 July 86, which reflects 6,535 days of Active Federal Service for the Period 1958 to 1986.

3. Attached as enclosure 2 is a copy of Fourth U.S. Army orders 069-001 dated 12 May 87, which reflects 140 days of SADT for FY 87. An additional

12 days of AT was performed at Ft. Snelling, Minnesota in FY 86.

4. I believe that I am eligible for lock-in under the provisions of Section 1163 of Title 10 U.S. Code and that it was the intent of Congress not to deprive soldiers who were within two years of Retirement eligibility from removal prior to completing 20 or more years of Active Federal Service as shown in Enclosure 3.

5. Officers in my category have only the provisions of Section 1163 of Title 10 U.S. Code upon which to attain 20 years of Active Federal Service. I have been kept out of the full-time Army National Guard/Reserve Program because of too much active service time and now I will be kept out of Annual Training, Active Duty for Training and Special Active Duty for Training for the same reasons. See Enclosure 4 for the latest message from DA, DCSPER.

* * * *

7. A copy of my Biographic Summary is attached as Enclosure 5.

8. Request I be ordered to Active Duty on 1 Oct 87 under the provisions of an applicable statute/Army Regulation for a period of approximately 24 months.

However, in accordance with the May 12, 1987 orders, plaintiff proceeded off active duty status on September 30, 1987.

On December 22, 1987, the Assistant Secretary of the Army (Manpower and Reserve Affairs), utilizing authority delegated by the Secretary of the Army, executed the following memorandum:

FOR DEPUTY CHIEF OF STAFF FOR PERSONNEL

SUBJECT: Release from Active Duty

Pursuant to 10 U.S.C. §§ 681 and 1163(d), the release from active duty of Major David V. Olson, 523-50-0580, is hereby approved, to be effective this date.

Delbert L. Spurlock, Jr. /s/
Delbert L. Spurlock, Jr.
Assistant Secretary of the Army
(Manpower and Reserve Affairs)

By letter dated March 16, 1988, plaintiff's senator forwarded a copy of a letter dated December 23, 1987 which the Army's Office of Legislative Liaison had sent concerning plaintiff's situation. The letter states (in part):

> This replies to your inquiry in behalf of Major David V. Olson concerning his request for retention on active duty.
>
> Section 1163(d), Title 10, United States Code, provides in relevant part:
>
> > "A member of a reserve component who is on active duty and is within two years of becoming eligible for retired pay or retainer pay under a purely military retirement system may not be involuntarily released from that duty before he becomes eligible for that pay, unless his release is approved by the Secretary."
>
> The Military Departments have interpreted this provision since its enactment as not applying to Reserve Component soldiers serving on short tours of annual training, active duty for training or special active duty for training. However, as indicated in Major Olson's letter, the U.S. Court of Appeals for the Federal Circuit has recently held that Section 1163(d) does apply to Reserve Component soldiers serving on these short tours. Accordingly, Section

1163(d) applied to Major Olson at the time of his release from active duty.

Section 1163(d) does not prohibit the involuntary release from active duty of Reserve Component soldiers, but only requires that such release be approved by the Secretary of the Army. In the case of Major Olson, he should not have been involuntarily released from active duty without the approval of the Secretary of the Army or the Assistant Secretary of the Army (Manpower and Reserve Affairs). As this approval was not obtained, Major Olson's release from active duty was not authorized. His orders have been amended to reflect that he was not released from active duty on September 30, 1987. However, on December 22, 1987, the Assistant Secretary of the Army (Manpower and Reserve Affairs) reviewed and disapproved Major Olson's request for retention on active duty and directed that he be released from active duty effective December 22, 1987.

On May 25, 1988, the Commander, Fourth U.S. Army, was ordered to amend plaintiff's orders to provide active duty time from his release on September 30, 1987 to December 22, 1987, the date the Assistant Secretary of the Army made his approval of the release "to be effective." The Memorandum concerned reads (in part):

FOR: Commander, Fourth U.S. Army, ATTN: AFKE-PR-ROM, Fort Sheridan, Illinois 60037-7000

1. Major David V. Olson's request for retention on active duty has been disapproved (Encl 7).

2. Major Olson's active duty tour occurred after the U.S. Court of Appeals had ruled in the *ULMET* decision that short periods of active duty for training did qualify for an individual to apply for the sanctuary provision of 10 U.S.C., 1163(d). Accordingly, section 1163(d) applied to Major Olson at the

time of his release from active duty on 30 September 1987. His release from active duty without the approval of the Secretary of the Army or the Assistant Secretary of the Army (Manpower & Reserve Affairs) was not authorized.

3. Amend his orders to reflect that he was not released from active duty on 30 September 1987. On 22 December 1987, the Assistant Secretary of the Army (Manpower & Reserve Affairs) reviewed and disapproved Major Olson's request for retention on active duty (Encl 1). His orders shall reflect that he was released from active duty effective 22 Februray 1987. Full pay and allowances that have accrued to him shall be disbursed and offset by any civilian employment salaries for the period 1 October 1987 thru 22 December 1987.

4. Advise Major Olson that if he determines an injustice or error has occurred, in view of the *ULMET* decision, he may petition the Army Board for Correction of Military Records (ABCMR) for relief. This does not intend to imply that he will be granted relief by the ABCMR. That is a matter for the ABCMR to decide based on its impartial review of all the submitted evidence. He will have the burden to demonstrate, by providing sufficient relevant evidence, that an injustice or error has occurred. An appeal to the ABCMR may be addressed to the Commander, U.S. Army Reserve Personnel Center, ATTN: DARP-PAS-AA, 9700 Page Boulevard, St. Louis, MO 63132-5200.

FOR THE DEPUTY CHIEF OF STAFF FOR PERSONNEL:

Stuart B. Travis /s/
STUART B. TRAVIS
Colonel, GS
Chief, Officer Division

Plaintiff filed the instant suit on November 25, 1988, claiming that his release on September 30, 1987 and on December 22, 1987 violates 10 U.S.C. § 1163(d) and provides a basis for an award of pay for active duty until 20 years of service is reached, and retirement pay thereafter. Based upon the action of the Assistant Secretary, in effect extending plaintiff's tour of active duty to December 22, 1987, defendant concedes that plaintiff is entitled to recover active duty pay from September 30, 1987 to December 22, 1987, less outside earnings. Otherwise, defendant opposes the additional relief sought.[1]

Plaintiff contests the December 22, 1989 approval action taken by the Assistant Secretary. However, except for violations of constitutional rights, the decision of a Secretary to release a Reserve officer from active duty is not subject to judicial review. *Woodward v. United States*, 871 F.2d 1068 (Fed. Cir. 1989). Exercising the authority provided in 10 U.S.C. § 1163(d) to approve an involuntary release from active duty does not implicate such constitutional rights. *See United States v. Augenblick*, 393 U.S. 348, 356 (1969). No basis has been set forth on which the release approval action un-

---

[1] It is not considered, however, that the "approved by the Secretary" action concerning an involuntary release from active duty under 10 U.S.C. § 1163(d) need always occur prior to the release. The Act provides for secretarial level approval action after knowledge is gained that a release from a tour of active duty would be involuntary, *i.e.*, that a member covered by 10 U.S.C. § 1163(d) has requested an extension and is available for the additional active duty time involved. Therefore, the time necessary to obtain action by the Secretary concerning approval of an involuntary release must be contemplated such that an "approved by the Secretary" action could well occur subsequent to a release from an active duty tour—particularly with respect to the short tours covered by active duty for training. Absent approval by the Secretary within a reasonable period of time, an involuntary release of a Reserve member covered by 10 U.S.C. § 1163(d) would produce back pay entitlement. *Wilson v. United States*, 16 Cl. Ct. 765 (1989), *appeal docketed*, No. 89-1598 (Fed. Cir. July 20, 1989).

der 10 U.S.C. § 1163(d) could be overturned. Plaintiff has set forth no other instance whereby he was released involuntarily from an active duty tour.

Accordingly, for the reasons expressed in *Green v. United States*, *supra*, plaintiff has not established entitlement to back active duty pay, or retired pay, except for active duty pay covering the period of October 1, 1987—December 22, 1987, which the Army was prepared to pay administratively prior to the initiation of this litigation.

In the above circumstance, it is ORDERED:

(1) Final judgment shall now be entered dismissing the complaint with no costs assessed, but without prejudice to the prompt administrative payment to plaintiff of active duty pay (less outside earnings) for the period October 1, 1987—December 22, 1987;

(2) Plaintiff shall take prompt action to obtain the administrative payment cited in (1), but if said payment should not occur within a reasonable period of time, upon a motion filed by plaintiff under Rule 60(b) so noting, this litigation shall then be reinstated for the purpose of obtaining the requisite information and entering a monetary judgment for the pay amount involved.

/s/ James F. Merow
JAMES F. MEROW
Judge

APPENDIX I

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

89-1598

LIEUTENANT COLONEL ALBERTIS WILSON,
Plaintiff-Appellee,

v.

THE UNITED STATES,
Defendant-Appellant.

ON PETITION FOR REHEARING

Before NIES, *Chief Judge,* RICH, MARKEY, *Circuit Judges,* BENNETT, *Senior Circuit Judge,* NEWMAN, ARCHER, MAYER, MICHEL, PLAGER, LOURIE, and CLEVENGER, *Circuit Judges.*

PLAGER, *Circuit Judge.*

ORDER

Lieutenant Colonel Albertis Wilson ("Wilson") petitions for rehearing of the Court's opinion and judgment in this appeal, decided October 19, 1990. The Court having considered the petition,

IT IS ORDERED THAT:

(1) The petition of Wilson is denied.

(2) The majority opinion of the Court in this appeal is clarified by the following modification:

The final paragraph, entitled "IV. Conclusion" and the statement of the Court's decision (*"REVERSED"*) are deleted, and replaced by:

"IV. Conclusion

We hold that the phrase 'on active duty' in 10 U.S.C. § 1163(d) does not include active duty for training. Assuming, as did the trial judge, that, for purposes of Wilson's summary judgment motion on the question of sanctuary, Wilson's status was active duty for training, it follows that he was not, on that basis, entitled to sanctuary.[7]

---

[7] Wilson has contested the issue of whether he was on active duty for training, arguing that his status was properly classified as active duty. Following the remand, the trial court will have that undecided issue before it."

The grant of summary judgment in Wilson's favor is vacated, and the case is remanded to the Claims Court for further proceedings consistent with this opinion.

VACATED AND REMANDED.

Circuit Judge Archer continues to concur in the result; Circuit Judge Mayer's dissent is unaffected.

FOR THE COURT

/s/ S. Jay Plager
S. JAY PLAGER
Circuit Judge

December 14, 1990
Date

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

89-1714

JAMES A. GREEN,
Plaintiff-Appellant,

v.

THE UNITED STATES,
Defendant-Appellee.

ORDER

Before MARKEY, Circuit Judge, BENNETT, Senior Circuit Judge, PLAGER, Circuit Judge.

A petition for rehearing having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, denied.

The suggestion for rehearing in banc is under consideration.

The mandate will issue on February 21, 1991.

FOR THE COURT,

/s/ Francis X. Gindhart
FRANCIS X. GINDHART
Clerk

Dated: February 14, 1991

cc: ALAN B. STERNSTEIN
JOHN S. GROAT

GREEN v US, 89-1714
(CLM-763-87 C)

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

89-1714

JAMES A. GREEN,
Plaintiff-Appellant,

v.

THE UNITED STATES,
Defendant-Appellee.

ORDER

A suggestion for rehearing in banc having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, declined.

FOR THE COURT,

/s/ Francis X. Gindhart
FRANCIS X. GINDHART
Clerk

Dated: February 26, 1991
cc: ALAN B. STERNSTEIN
JOHN S. GROAT

[Filed Feb. 26, 1991]

GREEN V US, 89-1714
(CLM 763-87 C)

APPENDIX K

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

89-1714, -1715, -1716, -1717, -1718

JAMES A. GREEN,
STEPHEN J. WEISSENBERGER,
HOWARD A. HARVEY, JERALD D. NELSON
and DAVID V. OLSON,
Plaintiffs-Appellants,

v.

THE UNITED STATES,
Defendant-Appellee.

Decided: October 26, 1990

Before MARKEY, *Circuit Judge**, BENNETT, *Senior Circuit Judge*, and PLAGER, *Circuit Judge*.

PLAGER, *Circuit Judge*.

DECISION

Plaintiffs James A. Green, Stephen J. Weissenberger, Howard A. Harvey, Jerald D. Nelson and David V. Olson each appeal respective decisions of the Claims Court, *Green v. United States*, No. 763-87C (Aug. 10, 1989), *Weissenberger v. United States*, No. 764-87C (Aug. 11,

---

* Circuit Judge Markey vacated the position of Chief Judge on 27 June 1990.

1989), *Harvey v. United States*, No. 788-87C (Aug. 11, 1989), *Nelson v. United States*, No. 556-88C (Aug. 14, 1989), and *Olson v. United States*, No. 673-88C (Aug. 16, 1989), granting summary judgment in favor of the Government thereby denying each plaintiff entitlement to sanctuary under 10 U.S.C. § 1163(d) (1982). On the basis of our holding in the companion case *Wilson v. United States*, No. 89-1598 (Fed. Cir. Oct. 19, 1990), we *affirm* the judgment of the Claims Court. Because we dispose of these cases under our reasoning in *Wilson*, we do not reach the subsidiary issues decided by the Claims Court in these cases.

OPINION

The situational facts of Lieutenant Colonel (LTC) Green, LTC Harvey, LTC Nelson and LTC Olson, for purposes of this opinion, are all basically the same. LTC Green, in 1978, after accruing over 14 years of active service time, was discharged from the Regular Army and was commissioned in the Army Reserve. Thereafter, he participated in several active duty for training (ADT) and special active duty training (SADT) tours, bringing his total creditable service time to over 18 years. On August 21, 1987, while on an ADT tour at East Point, Georgia, LTC Green requested sanctuary under § 1163(d).

LTC Harvey was involuntarily released from active duty in the Regular Army on June 27, 1980. Upon his release, LTC Harvey became a member of the Army Reserve. On or about November 26, 1983, by his participation in several ADT tours, LTC Harvey accrued 18 years of creditable service time. On November 10, 1987, while on inactive status, LTC Harvey requested § 1163 (d) sanctuary.

LTC Nelson, during a 5-day ADT tour at Travis Air Force Base, California, in December, 1987, accrued 18 years of creditable service time. During a subsequent

3-day ADT tour, also at Travis Air Force Base, LTC Nelson requested sanctuary under § 1163(d).

Major Olson, during a 140-day ADT tour at Fort Sheridan, Illinois, in September, 1987, accrued 18 years of creditable service time. During that tour, Major Olson requested sanctuary under § 1163(d).

All of these service members accrued 18 years of creditable service time while members of a reserve component and while on ADT tours; and, with the exception of LTC Harvey, all of them requested § 1163(d) sanctuary while on ADT tours—LTC Harvey was on inactive status when he requested sanctuary. None of these service members have been called to active duty since they became members of a reserve component. As we held in *Wilson*, a service member who is a member of a reserve component and who accrues 18 years of creditable service time, but who is on active duty for training—as opposed to active duty—is not entitled to the protection of § 1163(d).[1]

The facts surrounding Chief Warrant Officer (CWO) Weissenberger are different, but the outcome is the same. At the time CWO Weissenberger became a member of the Army Reserve in 1984, he had already accrued over 18 years of active service in the Regular Army. However, because CWO Weissenberger was not a member of a reserve component at the time he accrued 18 years of active service time, § 1163(d) did not apply to him.[2] While a member of the Reserve, he participated in several annual training (AT) tours. On November 3, 1987, while on AT duty, CWO Weissenberger requested sanctuary under § 1163(d). Because he was not on active duty at any time after becoming a member of a reserve component, our holding in *Wilson* dictates that he is not entitled to sanctuary under § 1163(d).

---

[1] LTC. Harvey was on inactive status when he requested sanctuary. Inactive status does not qualify as "active duty."

[2] Section 1163 does not apply to members of the Regular Army, but rather, applies to "member[s] of a reserve component."

APPENDIX L

10 U.S.C.A. § 101 (West 1983)

§ 101. Definitions

In addition to the definitions in sections 1-5 of title 1, the following definitions apply in this title:

* * * *

(22) "Active duty" means full-time duty in the active military service of the United States. It includes full-time training duty, annual training duty, and attendance, while in the active military service, at a school designated as a service school by law or by the Secretary of the military department concerned.

(23) "Active duty for a period of more than 30 days" means active duty under a call or order that does not specify a period of 30 days or less.

(24) "Active service" means service on active duty.

(25) "Active status" means the status of a reserve commissioned officer, other than a commissioned warrant officer, who is not in the inactive Army National Guard or inactive Air National Guard, on an inactive status list, or in the Retired Reserve.

* * * *

10 U.S.C.A. § 1163 (West 1983)

§ 1163. Reserve components; members; limitations on separation

(a) An officer of a reserve component who has at least three years of service as a commissioned officer may not be separated from that component without his consent except under an approved recommendation of a board of officers convened by an authority designated by the Sec-

retary concerned, or by the approved sentence of a court-marital. This subsection does not apply to a separation under subsection (b) of this section or under section 1003 of this title, to a dismissal under section 1161(a) of this title, or to a transfer under section 3352 or 8352 of this title.

(b) The President or the Secretary concerned may drop from the rolls of the armed force concerned any Reserve (1) who has been absent without authority for at least three months, or (2) who is sentenced to confinement in a Federal or State penitentiary or correctional institution after having been found guilty of an offense by a court other than a court-martial or other military court, and whose sentence has become final.

(c) A member of a reserve component who is separated therefrom for cause, except under subsection (b), is entitled to a discharge under honorable conditions unless—

(1) he is discharged under conditions other than honorable under an approved sentence of a court-marital or under the approved findings of a board of officers convened by an authority designated by the Secretary concerned; or

(2) he consents to a discharge under conditions other than honorable with a waiver of proceedings of a court-martial or a board.

(d) Under regulations to be prescribed by the Secretary concerned, which shall be as uniform as practicable, a member of a reserve component who is on active duty and is within two years of becoming eligible for retired pay or retainer pay under a purely military retirement system, may not be involuntarily released from that duty before he becomes eligible for that pay, unless his release is approved by the Secretary.

Supreme Court, U.S.
FILED
MAY 28 1991
OFFICE OF THE CLERK

(2)

No. 90-1451

In the Supreme Court of the United States

OCTOBER TERM, 1990

ALBERTIS C. WILSON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
STUART M. GERSON
Assistant Attorney General
DAVID M. COHEN
JOHN S. GROAT
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether members of the Armed Forces Reserve serving tours of active duty for training prior to the amendment of 10 U.S.C. 1163(d) in 1987 had a right under that statute to remain on active duty until they reached eligibility for retirement from active duty.

2. Whether formal letters from the Secretary of the Army or Air Force or his delegates approving the release of a reserve officer from active duty for training establish that the officer's release was "approved by the Secretary" under 10 U.S.C. 1163(d).

3. Whether reserve officers who do not request to remain on active duty and who are released at the end of their scheduled tours of duty for training are "involuntarily released" from active duty under 10 U.S.C. 1163(d).

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1451

ALBERTIS C. WILSON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the en banc court of appeals as to petitioner Wilson (Pet. App. 1a-20a, 63a-64a) is reported at 917 F.2d 529. The amendment to that opinion on rehearing (Pet. App. 63a-64a) is unreported. The opinion of the court of appeals as to the other petitioners (Pet. App. 21a-23a) is unreported. The opinions of the Claims Court as to petitioners Wilson (Pet. App. 24a-33a) and Green (Pet. App. 34a-40a) are reported at 16 Cl. Ct. 765 and 17 Cl. Ct. 716. The opinions of the Claims Court as to the other petitioners (Pet. App. 44a-46a, 47a-49a, 50a-53a, 55a-62a) are unreported.

JURISDICTION

The judgment of the en banc court of appeals as to petitioner Wilson was entered on October 19, 1990, and a petition for rehearing was denied on December 14, 1990 (Pet. App. 63a-64a). The judgment of the court of appeals as to the other petitioners was entered on January 24, 1991, and a petition for rehearing was denied on February 14, 1991 (Pet. App. 65a). The petition for a writ of certiorari was filed on March 14, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. After having served 16 years on active duty in the Army, Petitioner Wilson was honorably discharged in 1980 and was commissioned as an officer of the United States Army Reserve. Pet. App. 2a. Between 1980 and 1983, he served several tours of active duty for training. On October 3, 1983, he received orders to report for a 179-day tour of active duty for training. During that tour, he was scheduled to reach a total of 18 years of regular active duty service plus active duty for training, two years short of the 20 years required for retirement. *Ibid.* He wrote to Army headquarters requesting that he be retained on active duty pursuant to the "sanctuary" provision of 10 U.S.C. 1163(d) (1982), which at that time provided:

> Under regulations to be prescribed by the Secretary concerned, which shall be as uniform as practicable, a member of a reserve component who is on active duty and is within two years of becoming eligible for retired or retainer pay under a purely military retirement system, may not be involuntarily released from that

> duty before he becomes eligible for that pay, unless his release is approved by the Secretary.[1]

There is no record of a response to petitioner Wilson's letter. On March 28, 1984, he was released from his tour of active duty for training and returned to civilian status. Pet. App. 3a.

Petitioners Green, Weissenberger, Nelson, and Olson (the Green petitioners) were in similar, but not identical, situations. All were reserve officers who had served substantial periods of active duty in the military prior to the amendment of 10 U.S.C. 1163(d) in 1987. All served periods of active duty for training during which they reached a cumulative total of 18 years of regular active duty plus active duty for training, two years short of the 20 years required for retirement. Pet. App. 37a. Like petitioner Wilson, all of the Green petitioners except Harvey filed requests for extension of their tours of active duty for training while serving those tours and prior to the amendment of 10 U.S.C. 1163(d) in 1987. Pet. App. 22a-23a. Unlike Wilson, the involuntary releases of petitioners Green, Weissenberger, and Olson were approved by the Secretary of the Army, through his delegate. The Acting Secretary of the Air Force approved the involuntary release of petitioner Nelson. *Ibid.* Petitioner Harvey did not file a request for extension of his tour of active duty for training until after his release from that tour, and that request was subsequently denied. *Id.* at 23a.

2. Petitioner Wilson sued the United States in the Claims Court, contending that his release from active duty in 1984 was in violation of 10 U.S.C. 1163(d). The court granted judgment for Wilson, relying primarily on *Ulmet* v. *United*

---

[1] In 1987, 10 U.S.C. 1163(d) was amended to insert "(other than for training)" after "active duty." Act of Dec. 30, 1987, Pub. L. 100-224, § 4, 101 Stat. 1538.

States, 822 F.2d 1079 (1987), in which the Federal Circuit held that an individual on active duty for training is on "active duty" for purposes of Section 1163(d)'s sanctuary. Pet. App. 27a.

The en banc United States Court of Appeals for the Federal Circuit reversed. Pet. App. 1a-15a. The court concluded that the sanctuary provision as originally enacted in 1956 was not intended to apply to reserve officers serving on active duty for training, *id.* at 10a-11a; that the 1962 codification was not intended to effect a substantive change, *id.* at 11a; and that Congress in 1987 made clear that it never intended the statutory provision to apply to active duty for training. *Ibid.* In addition, the court found as an independent basis for its decision that deference is due to the consistent administrative interpretation that an individual may not become eligible for Section 1163(d) sanctuary while on active duty for training. Pet. App. 13a (citing *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-844 (1984)). Consequently, the court overruled *Ulmet*. *Id.* at 14a. Judge Archer concurred in the result without opinion. *Id.* at 15a.

Judge Mayer dissented. Pet. App. 16a-20a. In his view, considerations of stare decisis made it inappropriate to overrule *Ulmet*. Pet. App. 16a-17a. In addition, he would have held that the language of the statute supported *Ulmet* and was inconsistent with the en banc court's result. Pet. App. 18a.

3. The Green petitioners also sued the United States in the Claims Court, claiming the benefit of the sanctuary provision. In decisions rendered prior to the Federal Circuit's en banc decision in *Wilson*, the Claims Court agreed with their contention that, under *Ulmet*, they could apply for sanctuary under Section 1163(d) while on active duty for training. Pet. App. 37a, 45a, 49a, 50a. Nevertheless, the court denied their claims. With respect to petitioners Green,

Weissenberger, Nelson, and Olson, the court concluded that the appropriate Secretary of the service involved had "approved" the release within the meaning of Section 1163(d), thus making the release lawful. Pet. App. 38a-40a, 45a, 52a-53a. The Claims Court denied petitioner Harvey's claim solely on the ground that his release had not been "involuntary," since Harvey had not requested an extension under Section 1163(d) before his tour of duty ended. Pet. App. 49a.[2]

The appeals of the Green petitioners were decided by the Federal Circuit after its en banc decision in Wilson's case. After initially affirming the Claims Court's decision in reliance solely on the en banc decision in *Wilson*, a panel of the Federal Circuit withdrew its opinion and issued a brief new opinion affirming the Claims Court's decisions on the ground that "the Claims Court properly applied the correct law." Pet. App. 23a.

ARGUMENT

The decisions of the Federal Circuit were correct and not in conflict with any decision of this Court or any other court of appeals. Furthermore, in light of the 1987 amendment to Section 1163(d), the issues decided by the Federal Circuit have no continuing importance. Further review is therefore unwarranted.

1. Prior to 1987, Section 1163(d) provided that reserve members may not be "involuntarily released" from "active duty" within two years of eligibility for retirement pay, absent approval by the appropriate Secretary. The Federal Circuit correctly held in *Wilson* that the term "active duty," as used in Section 1163(d) prior to its 1987 amendment, did not include active duty for training.

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[2] The government did not contest Olson's claim for active duty pay for a three-month period in 1987. Pet. App. 61a.

Section 1163(d) was originally enacted in 1956. Act of July 9, 1956, ch. 534, § 265, 70 Stat. 517. The statute was codified as 50 U.S.C. 1016 (Supp. IV 1958). At that time, another provision of Title 50 defined the term "active duty" as "full-time duty in the active military service of the United States, *other than active duty for training*." 50 U.S.C. 901(b) (1952) (emphasis added). Thus, as the Federal Circuit observed, "the problem of ascertaining Congressional intent in this case is not difficult." Pet. App. 11a. At the time the statute was enacted, the term "active duty," as used in what is now Section 1163(d), plainly excluded active duty for training. See Pet. App. 10a-11a.

Between the enactment of what is now Section 1163(d) and its amendment in 1987, there were two major recodifications of the military provisions of the United States Code, in 1956 and 1962. Petitioners' essential claim is that the combined effect of the two recodifications was sufficient to change the meaning of the sanctuary provision as originally enacted. See Pet. 10-12. That claim was properly rejected by the court of appeals.

Later in 1956, after the enactment of what is now Section 1163(d), Congress recodified the military statutes. Among the many changes that Congress made at that time was the addition of a definition of "active duty" in Title 10, which included active duty for training. Act of Aug. 10, 1956, ch. 1041, § 101(22), 70A Stat. 5.[3] In addition, Congress repealed the definition of "active duty" in Title 50 that had excluded active duty for training. 70A Stat. 644 (repeal provisions). The 1956 recodification had no effect on the meaning of Section 1163(d). First, the recodified definitional provision of Title 10 provided that "the following definitions [including the new definition of 'active duty']

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[3] The new definition was based on the definition of the term "active Federal service" formerly found in 10 U.S.C. 1036e(d) (1952).

appy in this title." 10 U.S.C. 101 (Supp. IV 1958) (emphasis supplied). Yet what is now Section 1163(d) remained in Title 50. Thus, the change in the definitional provision in Title 10 had no effect on the meaning of the term "active duty" as used in what is now Section 1163(d). Second, it is clear that Congress did not intend to make substantive changes in the military statutes in the course of the recodification. S. Rep. No. 2484, 84th Cong., 2d Sess. 19 (1956) ("The object of the new titles has been to restate existing law, not to make new law."). Obviously, a change in the meaning of "active duty" in what is now Section 1163(d) would have been a substantive change.

In 1962, there was another recodification, in which Congress moved the "sanctuary" provision from Title 50 to Title 10, becoming 10 U.S.C. 1163(d). Although Title 10 now included a definition of "active duty" that included active duty for training and was thus inconsistent with the meaning of that term in what is now Section 1163(d), the legislative history of the recodification makes clear that the recodification was "not intended to make any substantive change in existing law." S. Rep. No. 1876, 87th Cong., 2d Sess. 6 (1962). The Federal Circuit therefore correctly held that the 1962 recodification should not be taken to have changed the meaning of Section 1163(d). As this Court has stated, "it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed." *Fourco Glass Co.* v. *Transmirra Corp.*, 353 U.S. 222, 227 (1957). Accordingly, the Court has frequently refused to give effect to apparent changes in statutory meaning that are introduced as unintended artifacts of a recodification. *Cass* v. *United States*, 417 U.S. 72, 81-82 (1974) (discussing the same 1962 recodification involved here); *Goldstein* v. *Cox*, 396 U.S. 471, 477-78 (1970) (1948 recodification of the Judicial Code). Here, Congress's intent not to change the law was

clearly expressed, and the Federal Circuit's decision in *Wilson* correctly implemented that intent.[4]

2. The Federal Circuit also correctly affirmed the Claims Court's holdings that the Secretaries of the Army and Air Force gave the appropriate approval for the release of all petitioners but Wilson and Harvey.[5] The other petitioners assert (Pet. 16-17) that the Secretarial approvals of the decisions to release them were invalid procedurally because Section 1163(d) is prefaced by the phrase "[u]nder regulations to be prescribed by the Secretary concerned," and no regulations governing Section 1163(d) have ever been promulgated. The statute does not, however, expressly condition the Secretary's authority to approve releases on the promulgation of regulations, and petitioners cite no authority for imposing such a requirement.

Petitioners also contend (Pet. 17-18) that the Secretarial approvals were substantively invalid because they were intended to "subvert" Section 1163(d). See Pet. 18. Yet, as the Claims Court held, the service Secretaries have broad

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[4] The Federal Circuit's interpretation is also supported by the 1987 legislation that amended the sanctuary provision to apply only to reservists "on active duty (other than for training)." Act of Dec. 30, 1987, Pub. L. No. 100-224, § 4, 101 Stat. 1538. The sponsor of the amendment in the House stated that its purpose was "to prevent a windfall never intended by law for a small group of reservists." 133 Cong. Rec. 35,821 (1987) (Rep. Byron). The sponsor of the bill in the Senate stated that the purpose of the legislation was to make a "technical correction" that "restores the original definition" and eliminates the "unintended effect" of the recodification. 133 Cong. Rec. 36,064 (1987) (Sen. Glenn). See *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 380-381 (1969); *Bell* v. *New Jersey*, 461 U.S. 773, 784 (1983).

[5] Although Wilson filed a request for extended active duty pursuant to the sanctuary provision, there is no record of any action taken on that request or of any approval of his release by the Secretary of the Army or his delegate. Petitioner Harvey's case is discussed at p. 9, *infra*.

authority, both in 10 U.S.C. 1163(d) and elsewhere, to release a reserve member from active duty. Pet. App. 40a (citing cases). The Secretary could reasonably conclude, without undermining the statute (even as construed by the now-overruled *Ulmet* decision), that petitioners' retention on active duty would not be in the best interests of their respective services.

3. Unlike the other Green petitioners, petitioner Harvey did not apply for extended active duty pursuant to the sanctuary provision until November 10, 1987, almost four years after he completed his most recent tour of active duty for training on January 27, 1984. See Pet. App. 49a. The Federal Circuit correctly affirmed the Claims Court's holding that his release was not "involuntary" within the meaning of Section 1163(d).

Petitioners' interpretation of Section 1163(d) would entail that tours of active duty for training of reserve members who reach the 18-year level of service would be extended for two years even if the reserve member did not request such an extension. As the Claims Court noted in adjudicating petitioner Green's claim, however, "[m]ost Reserve members serving short active duty training tours, and also having civilian career responsibilities," would not "welcome an interpretation that such brief training tours must automatically be extended two years under 10 U.S.C. § 1163(d) when the 18 years service point is reached." Pet. App. 39a. Therefore, a release should be held to be "involuntary" under 10 U.S.C. 1163(d) only if "the Reserve member * * * duly requests an amendment extending the tour" of duty. Pet. App. 39a. Because Harvey made no such request, his release accorded with the expectations of the parties at the time of his service and was not "involuntary" within the meaning of Section 1163(d). See Pet. App. 49a (rejecting Harvey's claim for reasons given in the *Green* decision).

4. Petitioners do not assert that the Federal Circuit's decisions in these cases conflict with any decision of any other court of appeals. In addition, the 1987 amendment to Section 1163(d) makes clear that the term "active duty" in Section 1163(d) excludes "active duty for training." See note 1, *supra*. The amendment therefore definitively precludes claims like those of petitioners arising after December 30, 1987. Accordingly, the issues presented in this case have no continuing importance. Further review is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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